IN THE SUPREME COURT OF THE STATE OF NEVADA

MELVIN GONZALES,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

SUPREME COURT No. 78152
Dist Ct. Case. CV 20,547

APPEAL FROM JUDGMENT OF THE HONORABLE
MICHAEL MONTERO

SIXTH JUDICIAL DISTRICT COURT

APPELLANT'S APPENDIX

VOLUME TWO

KARLA K. BUTKO, Esq.
Attorney for Appellant
P. O. BOX 1249
Verdi, Nevada 89439
(775) 786-7118
State Bar #: 3307

MICHAEL MACDONALD
Humboldt County District Attorney
Attorney for Respondent
P. O. Box 909
Winnemucca, Nevada 89446
(775) 623-6363
Anthony Gordon, Esq.

INDEX TO APPELLANT'S APPENDIX

VOLUME 1

Document	Pages
Information	1-4
Transcript of Proceedings, Arraignment & Plea (1/7/2014)	5-20
Guilty Plea Agreement	21-30
Judgment of Conviction (04/22/2014)	31-34
Transcript of Proceedings, Sentencing (04/15/2014)	35-54
Fast Track Statement Docket 65768	55-68
Fast Track Response	69-75
Petition for Writ of Habeas Corpus (Post-Conviction)	76-97
State's Response to Petition for Writ of Habeas Corpus (Post-Conviction)	98-115
Supplemental Petition for Writ of Habeas Corpus (Post-Conviction)	116-136
State's Evidentiary Hearing Brief and Response to Petitioner's Writ of Habeas Corpus (Post-Conviction)	137-148
Transcript of Proceedings, Post Conviction Evidentiary hearing (10/042018)	149-245
Amended State's Evidentiary Hearing Brief and Response to Petitioner's Writ of Habeas Corpus (Post-Conviction)	246-250

INDEX TO APPELLANT'S APPENDIX

VOLUME 2

Document	Pages
Amended State's Evidentiary Hearing Brief and Response to ..... Petitioner's Writ of Habeas Corpus (Post-Conviction) continued	251-255
Ground Seven to Supplemental Petition for Writ of Habeas Corpus ... (Post-Conviction)	256-266
State's Response to Ground Seven to Supplemental Petition for ..... Writ of Habeas Corpus (Post-Conviction)	267-276
Reply to State's Response to Ground Seven to Supplemental Petition ..... For Writ of Habeas Corpus (Post-Conviction)	277-281
Notice of Entry of Order and Order Denying Petition for Writ of Habeas Corpus (Postconviction) & Findings of Fact	282-297
Notice of Appeal	298-299
Amended Felony Complaint	300-304

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

and resulting prejudice such that there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different. *Oliver, supra* 281 P.3d at 1206, citing *Strickland v. Washington,* 466 U.S. at 694; and *Weaver v. Warden,* 107 Nev. 856, 858–59, 822 P.2d 112).

The Petitioner's first allegation of ineffective assistance of counsel, listed as ground 1, in his Supplemental Petition for Writ of Habeas Corpus (Post-Conviction), was that his trial counsel failed to adequately prepare and investigate the Petitioner's case by failing to prepare pre-trial motions to suppress property located at the Economy Inn, Room #114, in Winnemucca, Nevada. *(See Petitioner's Supplemental Petition for Writ of Habeas Corpus (Post-Conviction), page 6-9).* However, besides the fact that the entry of a guilty plea generally waives any right to appeal from the events occurring prior to the entry of the guilty plea under Webb v. State, 91 Nev. 469, 538 P.2d 164 (1975), the above case law is clear that the decision on whether to actually challenge the search warrant, or when to actually do so, and on what motions to file in a case, are strategic decisions made by trial counsel, and are assumed to be intentional and are "virtually unchallengeable," under *Doleman, supra* 112 Nev. at 848, 921 P,2d at 280 (quoting *Howard v. State*, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990). In this case, the Petitioner plead guilty, thus alleviating any decision of his trial counsel to eventually challenge the initial view of his room by law enforcement, which any success on in not at all certain, since this case has issues of both standing, as to whether Petitioner had a "reasonable expectation of privacy" in his hotel room, and whether the hotel manager had apparent authority to enter the hotel room without the Petitioner's consent. (*See State v. Taylor*, 114 Nev. 1071, 968 P.2d 315 (1998).

According to the well-known and respected treatise on search and seizure law where an earlier edition was cited for support by the Court in *Brendlin*, 6 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, Sec 11.3(e) at p.243, (5th ed. 2012 and Supp.

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

2013-2014), LaFave, citing *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), noted that "When a question is raised as to whether a particular person has standing to object regarding the search of a certain vehicle, once again the fundamental inquiry is whether the search intruded upon that person's 'reasonable expectation of freedom from governmental intrusion.'" *(See also, Rakas v. Illinois*, 439 U.S. 128 (1978) where a lack of standing was found as to the occupants of a vehicle who were ordered out of the car where incriminating evidence was later found, in light of the fact that the passengers did not assert any ownership or possessory interest in either the car, nor the illicit evidence recovered within the vehicle. As a result, since any successful challenge to the search in this case was at least questionable, it was entirely reasonable that a strategy decision be made by his trial counsel to not directly change the search under *Doleman, supra.* Therefore, as a result, Petitioner's first allegation of ineffective assistance of counsel lacks merit.

The Petitioner's second allegation of ineffective assistance of counsel, listed as ground 2, in his Supplemental Petition for Writ of Habeas Corpus (Post-Conviction), was that his trial counsel failed to adequately prepare and investigate the Petitioner's mental health issues, mainly failing to conduct a reasonable investigation to provide the Court with evidence that the Petitioner was suffering from mental health issues at the time that he sent the text messages in this case. *(See Petitioner's Supplemental Petition for Writ of Habeas Corpus (Post-Conviction), page 6-12).*

In this case, the Petitioner plead guilty negating the possibility that he could have raised a lack of intent issue at trial, which any decision to raise this issue would have been a trial strategy decision "virtually unchallengeable" under *Doleman, supra* 112 Nev. at 848, 921 P.2d at 280 (*quoting Howard v. State*, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990), strategic decisions based on an incomplete investigation are reasonable "precisely to the extent

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

that reasonable professional judgments support the limitations on investigation." *Strickland, supra* 466 U.S. at 690-91). As noted above, courts have noted that effectiveness encompasses making "sufficient inquiry into the information that is pertinent" to the case in order to make "a reasonable strategy decision on how to proceed with a client's case." *See Doleman v, State*, 112 Nev. 843, 848, 921 P.2d 278, 280 (1996) (*citing Strickland*, 466 U.S. at 690-91).

Furthermore, the Petitioner has failed meet the second prong of *Strickland, supra*, by establishing "prejudice" by a showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *(Strickland, supra, 466 U.S at 687.)* As a result, Petitioner's second supplemental allegation of ineffective assistance of counsel is groundless since Petitioner's decision to plead guilty negated any tactical trail strategy decisions that would have been made if the case had proceeded to trial.

The Petitioner's third allegation of ineffective assistance of counsel, listed as ground 3, in his Supplemental Petition for Writ of Habeas Corpus (Post-Conviction), is that he plead guilty because he was coerced into it by his trial counsel. *(See Petitioner's Supplemental Petition for Writ of Habeas Corpus (Post-Conviction), page 12-13).* In the present case, the Petitioner seeks a withdrawal of his guilty plea after sentencing, as compared to before, where the burden is higher in order to do so. Under *Molina v. State*, 120 Nev. 185, 87 P.3d 533,(2004), it was noted that Nevada courts "apply a more relaxed standard to presentence motions to withdraw guilty pleas than to post-sentencing motions," *Molina, supra* 120 Nev. at 191, 87 P.3d at 537, the Court in *Molina* noted that "guilty pleas are presumptively valid, especially when entered on advice of counsel." *Id.* At 190, 87 P.3d at 537. Furthermore, under *Stevenson v. State*, 131 Nev. Adv. Op. 61, 354 P.3d 1277, 1281 (2015), the Court noted that the "district court must consider the totality of circumstances to determine whether permitting withdraw of a guilty plea before sentencing would be just and fair." Previously, under *Bryant v. State,* 102 Nev 268, 721 P.2d 364, (1986),

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

the Nevada Supreme Court noted that the trial court must "review the entire record to determine whether the plea was valid, either by reason of the plea canvass itself or under a totality of the circumstances approach. See *Bryant, supra* 102 Nev at 272, 721 P.2d at 368. (*Bryant* superseded by statute on other grounds as noted in *Hart v. State*, 116 Nev. 558, 562, 1 P.3d 969, 971 (2000).

In *Stevenson, supra,* the Nevada Supreme Court noted that time constraints and pressure from interested parties exist in every criminal case, and that from the record there, there was no indication that their presence prevented the defendant from making a voluntary and intelligent choice among the options. *Stevenson, supra* at 354 P.3d at 1282-83. (*See also, Doe v. Woodford,* 508 F.3d 563, 570 (9th Cir.2007)(Test for determining whether a plea is valid is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant). In the present case, in reviewing the totality of the sentencing transcript in this case, it is clear that Petitioner knew the consequences of his plea and that the plea was voluntarily and intelligently made under *Stevenson, supra.* As a result, Petitioner's third allegation of ineffective assistance of counsel lacks merit.

The Petitioner's fourth allegation of ineffective assistance of counsel, listed as ground 4, in his Supplemental Petition for Writ of Habeas Corpus (Post-Conviction), was that his trial counsel failed to file a motion to sever his case into two cases. *(See Petitioner's Supplemental Petition for Writ of Habeas Corpus (Post-Conviction), page 13-15).* This contention lacks merit because under NRS 174.155, joinder is discretionary, not mandatory, and any decision to do would be a trial strategy decision "virtually unchallengeable" under *Doleman, supra.* As a result, Petitioner's fourth allegation of ineffective assistance of counsel lacks merit as well.

The Petitioner's fifth allegation of ineffective assistance of counsel, listed as ground 5, in his Supplemental Petition for Writ of Habeas Corpus (Post-Conviction), was that his trial counsel was ineffective for failing to file pre-trial motions that would have resulted in the proper charge,

253-A

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

NRS 200.575(3) (texting), a Category C Felony, instead of the crime he plead guilty to, Aggravated Stalking, a Category B Felony in violation of NRS 200.575(2). *(See Petitioner's Supplemental Petition for Writ of Habeas Corpus (Post-Conviction), page 15-17).* This contention again lacks merit because, as noted above, any decision to file such a motion would be part of a trial strategy and "virtually unchallengeable" under *Doleman, supra.* As a result, Petitioner's fifth allegation of ineffective assistance of counsel lacks merit.

The Petitioner's sixth and final allegation of ineffective assistance of counsel, listed as ground 6, in his Supplemental Petition for Writ of Habeas Corpus (Post-Conviction), was that his trial counsel was ineffective at sentencing for failing to provide mitigation evidence to the court. *(See Petitioner's Supplemental Petition for Writ of Habeas Corpus (Post-Conviction), page 17-19).*

As noted above, as to claims of ineffective assistance of trial counsel at the sentencing proceeding, the Nevada Supreme Court in *Oliver,* supra noted that to state a claim of ineffective assistance of counsel sufficient to warrant a new sentencing hearing, a petitioner must demonstrate that his counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different. *Oliver, supra,* 281 P.3d at 1206, citing *Strickland v. Washington,* 466 U.S. at 694; and *Weaver v. Warden,* 107 Nev. 856, 858–59, 822 P.2d 112). Additionally, there is no indication in the record here but for counsel's errors, the outcome of the sentencing proceedings would have been different. *Oliver, supra.* Furthermore, in *McNelton v. State*, 115 Nev. 396, 990 P.2d 1263, (1999), the Nevada Supreme Court held that what mitigation evidence to introduce at trial is a tactical decision, and this rational would hold true at sentencing, since what evidence a defendant may put forth before the Court, such as his mental health history, may expose a defendant to further

aggravating evidence. *See Cullen v. Pinholster*, 563 U.S. 170 (2011). Essentially, in the present case, what evidence or testimony to put forth before the sentencing court would fall under the realm of reasonable strategy decisions on how to proceed with a client's case under *Doleman*, supra. As a result, Petitioner's sixth and final supplemental allegation lacks merit and must fail well.

CONCLUSION

Based on the above legal arguments and all facts and pleadings herein, the Petitioner has failed on all of his allegations of Nevada Statutory and U.S. Constitutional error alleged in his Original and Supplemental Petitions for Writ of Habeas Corpus (Post-Conviction). Accordingly, it is respectfully requested that this Court deny the Petitioner's Original and Supplemental Petitions for Writ of Habeas Corpus (Post-Conviction) in their entirety.

DATED this 24 day of October, 2018.

ANTHONY R. GORDON
Deputy District Attorney

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

254-A

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) I certify that I am an employee of the Humboldt County District Attorney's Office, and that on the 5 day of October, 2018, I delivered a copy of the **AMENDED STATE'S EVIDENTIARY HEARING BRIEF AND RESPONSE TO PETITIONER'S SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)** to:

MELVIN LEROY GONZALES #1018769
Lovelock Correctional Center
1200 Prison Road
Lovelock, Nevada 89419

KARLA K. BUTKO, ESQ.
1030 Holcomb Ave.
Reno, Nevada 89502

ADAM PAUL LAXALT
Nevada Attorney General
100 N. Carson Street
Carson City, Nevada 89701

(X) U.S. Mail
( ) Certified Mail
( ) Hand-delivered
( ) Placed in DCT Box
( ) Via Facsimile

KARLA K. BUTKO, ESQ.
State Bar No. 3307
1030 Holcomb Ave.
Reno, Nevada 89502
(775) 786-7118
Attorney for Petitioner

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF HUMBOLDT

MELVIN LEROY GONZALES,

Petitioner,

vs. Case No. CV 20,547

THE STATE OF NEVADA, Dept. No. 2

Respondent.
_____/

GROUND SEVEN TO SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

This Ground Seven to the Supplemental Petition is filed pursuant to Nevada Revised Statutes 34.735, et. seq. And this Court's Oral Order granting Petitioner's Oral Motion to amend the pleadings and add Ground Seven, relating to ineffective assistance of counsel for his handling of a breach of the plea bargain at the sentencing stage and on direct appeal.

Ground Seven: Counsel was ineffective under the 6th & 14th Amendments to the United States Constitution when counsel failed to object to the State's breach of the plea bargain at the sentencing hearing, failed to argue in support of the plea bargain, and when counsel failed to raise a breach of the plea bargain on direct appeal.

Statement of Facts:

The Guilty Plea Agreement filed on January 7, 2014 provided as follows:

"I hereby agree to plead guilty to: 3 COUNTS OF AGGRAVATED STALKING, A Category B Felony, in violation of NRS 200.575(2)(a)".....

"Both sides are free to argue at the time of sentencing."

"The State agrees to recommend that the **penalty on each count run concurrent to each other.**" Page 1, GPA.

At the arraignment, the Court misinterpreted that the parties were free to argue at the time of sentencing. Page 5, Arraignment 6/11/14. Neither the State nor Defense counsel corrected the Court's recitation of the plea bargain to the actual plea bargain for the State to recommend concurrent terms on the three counts. The Court did canvas Mr. Gonzales on the contents of the Guilty Plea Agreement and determine that he signed the document. The Guilty Plea Agreement is the contract between the State and the Defendant.

The Presentence Investigation Report dated February 4, 2014, made a sentencing recommendation of Count I: 62-156 months in prison; Count II: 62-156 months in prison, consecutive to Count I, and Count III, 62-156 months consecutive to Count I but concurrent to Count II.

At the sentencing hearing, the State made an argument for incarceration but then stated: "Your Honor, I concur with the recommendation contained in the presentence investigation".

This violated the plea bargain. Defense counsel did not object. Defense counsel did not argue for the Court to enforce the plea bargain. Defense counsel argued for mental health court but never mentioned concurrent or consecutive in his argument at all.

Mr. Cochran remained counsel at the direct appeal stage of the Case. In Docket 65768, Mr. Cochran did not argue the breach of the plea bargain by the State. The issues argued on direct appeal were 1) Only one conviction should stand as the others were in violation of Double Jeopardy and 2) jurisdiction did not vest in Humboldt County so the case should have been prosecuted in Washoe County. This was unsuccessful. The convictions and sentences were upheld in the Order of Affirmance on the appeal.

THE LAW ON PLEA BARGAINS:

Defendants have a right to constitutional effective assistance of counsel that extends to the plea bargain stage. This is proper in a system in which 97% of federal criminal cases and 94% of state criminal cases negotiate rather than proceed to trial. See *Missouri v. Frye*, 132 S. Ct. 1399, at 1386-1387, (2012).

When the State enters into a plea agreement, it "is held to 'the most meticulous standards of both promise and performance' " with respect to both the terms and the spirit of the plea bargain. *Van Buskirk v. State*, 102 Nev. 241, 243, 720 P.2d 1215, 1216 (1986) (quoting *Kluttz v. Warden*, 99 Nev. 681, 683-84, 669 P.2d 244, 245 (1983)).

The seminal United States Supreme Court decision regarding the government's breach of a plea agreement *is Santobello v. New York*, 404 U.S. 257 (1971). In that case, the prosecutor agreed to make no recommendation as to the sentence. However, at sentencing the prosecutor recommended the maximum sentence. In vacating the judgment of conviction due to the breach of the plea agreement, the Supreme Court explained:

> "we conclude that the interests of justice and appropriate recognition of the duties of the prosecution in relation to promises made in the negotiation of pleas of guilty will be best served by remanding the case to the state courts for further consideration [of the appropriate relief for the breach—specific performance or withdrawal of the plea]." Id. 262-263.

The Due Process Clause of the Fourteenth Amendment guarantees a criminal defendant the effective assistance of counsel on his first appeal. *Evitts v. Lucey*, 469 U.S. 387, 391-405 (1985). Although deference is given to appellate counsel's decisions of which issues to raise on appeal, nonetheless, appellate counsel can be held ineffective if it fails to select proper claims for appeal. *Jones v. Barnes*, 463 U.S. 745 (1983). A claim of ineffective assistance of appellate counsel is reviewed under the *Strickland* test. In order to establish prejudice based on deficient assistance of appellate counsel, the petitioner must show that the omitted issue would have had a reasonable probability of success on appeal. *Lara v. State*, 120 Nev. 177, 183-84, 87 P.3d 528, 532 (2004) (citing *Kirksey*, 112 Nev. at 998, 923 P.2d at 1114)

This sentence was in excess of that needed for society's

interests. The District Court's sentencing analysis was not 'reasoned' as the law requires (NRS 193.165) and relied upon suspect evidence. See United States v. Rita, 551 U.S. 338, 127 S. Ct. 2456, 2468-69 (2007) and Gall v. United States, 128 S. Ct. 586 (2007).

There can be no good reason that defense counsel did not object when Mr. Pasquale argued for consecutive sentences on Count I & II, in violation of the plea bargain. There can be no good reason counsel did not remind the Court of the beneficial plea bargain during counsel's sentencing argument. There can be no good reason why this breach of the plea bargain was not raised on direct appeal as it was plain error for the State to violate the contract it entered into on the case.

The constitutional right to effective assistance of counsel extends to a direct appeal. Burke v. State, 110 Nev. 1366, 1368, 887 P.2d 267, 268 (1994). A claim of ineffective assistance of appellate counsel is reviewed in the "reasonably effective assistance" test set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) and Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (Nev. 1996).

Every breach of a plea bargain requires reversal. Harmless-error analysis is not applicable. Specific performance of the agreement was the proper remedy. This case must be remanded for resentencing before a different judge. *Echeverria v. State*, 119 Nev. 41, 62 P.3d 743 (2003). This was not a minor inaccuracy by the State. When Mr. Cochran testified that he did

not understand the terms of the plea bargain, it was clear that he admitted he was ineffective. There is no way a defense attorney could misinterpret an affirmative obligation to "recommend" that the penalty on the three counts run concurrently to each other.

Mr. Gonzales sentence should be vacated and the case remanded to a different sentencing Judge for a new sentencing proceeding. The case file and prior sentence should be **SEALED** so that Judge will not simply impose the same sentence in a rubber stamp mode out of respect for this Judge's view. It is also interesting to note that this Court may well have sentenced Mr. Gonzales to concurrent sentences, if the Court had been aware of the plea bargain and the plea bargain had been honored by the State.

CLOSING ARGUMENT ON REMAINING ISSUES LITIGATED AT THE EVIDENTIARY HEARING.

This Court heard very straightforward testimony on this case.

1. Search Warrant issues: The issues regarding the search warrant are abundantly clear. The police officers entered the room of Mr. Gonzales based upon the motel employee opening the door for them. Mr. Gonzales had paid his rent for the room. Mr. Gonzales did not give anyone consent to enter his room when he was not there. The police had no sign that anyone was in the room, there was no noise, no movement and no TV on. The police entered and did a "sweep" but then took time to notice stolen

property which was only in plain view after the police entered illegally. There was no emergency warranting police entry in the room without a warrant. The search warrant was obtained based upon the information provided after the police illegally entered, tainting the warrant.

Warrantless home entries, the chief evil against which the Fourth Amendment protects, are presumptively unreasonable unless justified by a well-delineated exception, such as when exigent circumstances exist. U.S. Const. amend. 4. See *Camacho v. State*, 119 Nev. 395, 400, 75 P.3d 370, 374 (2003). Under established law, see, e.g., *Alward v. State*, 112 Nev. 141, 151, 912 P.2d 243, 250 (1996), overruled in part on other grounds by *Rosky v. State*, 121 Nev. 184, 190-91 & n.10, 111 P.3d 690, 694 & n.10 (2005), one such exigency is the need to "render emergency assistance to an injured occupant or to protect an occupant from imminent injury." Brigham City, 547 U.S. at 403, and *Hannon v. State*, 125 Nev. 142, 207 P.3d 344 (2009).

Whether in a particular case an apparent consent to search without a warrant was voluntarily given is a question of fact." Id. at 253, 391 P.2d at 868. "This court is not a fact-finding tribunal; that function is best performed by the district court." *Zugel v. Miller*, 99 Nev. 100, 101, 659 P.2d 296, 297 (1983). Defense counsel failed to file a motion. The motel employee did not have authority to grant consent to enter Mr. Gonzales apartment. Mr. Gonzales was not there to invoke his rights. Mr. Gonzales would have no reason to allow some employee to give

police the right to enter his apartment. Without the illegal entry, police did not have probable cause to believe either Mr. Gonzales or any stolen property would be in the room. In fact, Mr. Gonzales was arrested off property. There was no actual or apparent authority for the employee to allow police to enter the room. The police did not have any reason to believe the authority being exercised by this employee was based upon consent given by Mr. Gonzales. *State v. Taylor*, 114 Nev. 1071, 1077, 968 P.2d 315, 320 (1998).

Counsel had many charges and failed to file any type of motion work. Mr. Cochran's response to that was he was worried about the application of the habitual offender statute and wanted Mr. Gonzales to accept a plea offer. Yet, plea offers are usually more generous when the State discovers flaws in their evidence.

2. Failure to move to sever the charges:

This case was basically a pig pile of charges against Mr. Gonzales. Many of the charges had defenses to the actual crimes charged by the State. Failure to sever the case into two cases prejudiced Mr. Gonzales. The stalking charges were their own case. Had the charges been litigated, it would have been immediately clear that Mr. Gonzales violated NRS 200.575 (3) when he texted threats to the victims. Mr. Gonzales never violated NRS 200.575(2). Mr. Cochran's response to this issue was that he was afraid of the habitual offender enhancement if he lost the case to even one felony charge. Yet, the Court would have

actually heard the testimony and understood that this drunk defendant was being text abusive via electronic devices and was guilty of a Category C felony with a penalty of 1-5 years. Mr. Cochran believed the plea bargain risking 18-45 years was a good ending on the case. Mr. Gonzales disagrees.

Once the motion work was successful on the attack of the search at the hotel room, the possession of stolen property charge would have to be dismissed. The possession of controlled substance charge would be dismissed. That left the burglary charge which was a misunderstanding.

The reality of the case was that Mr. Gonzales would have been successful in defending most of the charges and the ones he would have lost would have been reduced from the level of charge to which he pled guilty.

Mr. Gonzales testified that he was taking medications at the jail when the case was pending, when he pled guilty and at sentencing. He testified that those medications made him "high" and that he did not fully understand what was going on with his case. Certainly, if he had been clear headed he would have objected at the plea hearing and reminded his attorney that the State had to recommend concurrent sentences. He would have objected at the sentencing hearing when the State did not recommend concurrent prison sentences.

CONCLUSION

Mr. Gonzales met his burden of proof. The petitioner must demonstrate the underlying facts by a preponderance of the

evidence. *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004). The Sixth Amendment to the United States Constitution guarantees to every criminal defendant a right to the effective assistance of counsel. See *Strickland v. Washington*, 466 U.S. 668 (1984); *Warden v. Lyons*, 100 Nev. 430, 683 P.2d 504 (1984). Normally, to state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must satisfy a two-prong test: he must demonstrate that counsel's performance was deficient and that the deficiency prejudiced him. *Strickland*, 466 U.S. at 687.

Mr. Gonzales is entitled to relief. The plea bargain is subject to specific performance. A new sentencing proceeding is warranted. Trial and appellate counsel were ineffective under the 6th & 14th Amendments. This Court could simply hold that the State breached the plea bargain, mandating reversal of the conviction and a new sentencing before a Judge who has not been part of the case to date. If that remedy is granted, this Court should seal the transcripts of the prior sentencing and the post-conviction portion of the case so the new Judge will not be swayed by the prior sentence imposed herein.

Dated this 17th day of October, 2018.

By: _____

KARLA K. BUTKO, Esq.
P. O. Box 1249
Verdi, NV 89439
(775) 786-7118
State Bar No. 3307

CERTIFICATE OF SERVICE

Pursuant to NRCP 5, I certify that I am an employee of Karla K. Butko, 1030 Holcomb Avenue, Reno, NV 89502, and that on this date I caused the foregoing document to be delivered to all parties to this action by

X placing a true copy thereof in a sealed, stamped envelope with the United States Postal Service at Reno, Nevada.

_____ personal delivery

_____ Facsimile (FAX)

_____ Federal Express or other overnight delivery

_____ Reno/Carson Messenger Service

addressed as follows:

Anthony Gordon, Esq.
Humboldt County District Attorney's Office
P. O. Box 909
Winnemucca, NV 89446

DATED this 17 day of October, 2018.

KARLA K. BUTKO

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the Social Security Number of any person.

DATED this 17 day of October, 2018.

KARLA K. BUTKO, ESQ.

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

Case No. CV 20,547

Dept. No. II

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF HUMBOLDT.

-oOo-

MELVIN LEROY GONZALES,

Petitioner,

RENEE BAKER, WARDEN, ELY STATE PRISON

Respondent.

_____/

STATE'S RESPONSE TO GROUND SEVEN TO PETITIONER'S SUPPLEMENTAL PETITION WRIT OF HABEAS CORPUS (POST CONVICTION)

COMES NOW, the State of Nevada, by and through Anthony R. Gordon, Humboldt County Deputy District Attorney, and hereby files this Response to Ground Seven to Petitioner's Supplemental Petition for Writ of Habeas Corpus (Post-Conviction). This Response is based upon the attached Points and Authorities and all the pleadings and papers on file herein.

Pursuant to NRS 239B.030, the undersigned hereby affirms this document does not contain the social security number of any person.

DATED this 16th day of November, 2018.

ANTHONY R. GORDON
Deputy District Attorney

167

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

POINTS AND AUTHORITIES

I.

FACTS

On January 17, 2013, the Petitioner was arrested by the Humboldt County Sheriff's Office for aggravated stalking charges against his ex-wife Connie Ramirez and her parents, who lived in Humboldt County, Nevada. Subsequently, on January 7, 2014, pursuant to a guilty plea agreement the Petitioner entered a plea of guilty to three (3) counts of Aggravated Stalking, a Category B Felony, in violation of NRS 200.575(2), and was thereafter sentenced on April 15, 2014, to three (3) consecutive terms of a minimum of sixty-two (62) to one hundred fifty-six (156) months in the Nevada Department of Corrections.[1] The Nevada Supreme Court issued an Order of Affirmance in this case on November 12, 2014. Thereafter, the Petitioner filed a Writ of Habeas Corpus (Post-Conviction) on November 16, 2015, with the Respondent filing a response brief on May 12, 2016, and the Petitioner subsequently filed a Supplemental Petition for Writ of Habeas Corpus (Post-Conviction) on May 15, 2017. Upon review of the relevant papers and pleadings herein, the Court ordered an evidentiary hearing in this matter on April 13, 2018. This Response is filed in opposition to Ground Seven to Petitioner's Supplemental Petition for Writ of Habeas Corpus (Post-Conviction), as well as submitting closing arguments in this matter.

II.

LEGAL ARGUMENT

The Petitioner amends his Supplemental Petition for Writ of Habeas Corpus (Post-Conviction), to assert a seventh ground of ineffective assistance of counsel under the 4th, 6th and 14th Amendments to the U.S. Constitution by alleging that his trial counsel failed to object and

[1] The factual basis herein comes from the Presentence Investigation Report dated February 4, 2014, and submitted to this Court by the Nevada Department of Public Safety. Parole and Probation Division, and the testimony given before this Court at the Evidentiary Hearing herein.

268

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

argue in support of the State's breach of the plea bargain at the sentencing hearing, and failed to raise this alleged issue on direct appeal. This seventh allegation is groundless, and like the Petitioner's six other purported grounds of ineffective counsel of counsel, are all not supported factually by the record or legally under relevant statutory and Federal and Nevada Constitutional law. As a result, the Petitioner's Original and Supplemental Writ of Habeas Corpus (Post-Conviction) must be denied in their entirety.

The law is clear in this area. While the 6th Amendment to the United States Constitution guarantees effective assistance of counsel at trial, in order to establish a claim of ineffective assistance of counsel, the Petitioner must first show that counsel's performance fell beneath "an objective standard of reasonableness" *Strickland v. Washington*, 466 U.S. 668, 688 (1984). Only when the Petitioner has shown that counsel's performance fell beneath "an objective standard of reasonableness" and a deficiency therefore exists, the Petitioner must then show, but for his counsel's deficiency, a different result would have been had at trial. *Id* at 694; *Rubio v. State*, 124 Nev. 1032, 1040, 194 P.3d 1224, 1229 (2008).

In the present case, the Petitioner's alleges post-conviction, and not on direct appeal, a breach of the state's plea agreement in this case. Nevertheless, while the law for ineffective assistance of counsel claims under *Strickland, supra,* is different from an analysis of a breach of a plea agreement on direct appeal under *Van Buskirk v. State*, 102 Nev. 241, 720 P.2d 1215, (1986), it is clear from the facts presented at the evidentiary hearing in this matter than no such breach did in fact occur. This was clearly shown at the evidentiary hearing where the Petitioner's trial and appellate counsel testified that he did not believe that the State breached the plea agreement, which is apparently why trial counsel did not object to any such breach in the trial court or raise the issue on direct appeal. The Petitioner notes in his latest Supplemental Petition for Writ of Habeas Corpus (Post-Conviction) that the State did concur with the recommendation contained in the Nevada

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

Department of Public Safety, Division of Parole and Probation, prepared Presentence Investigation Report, and it was this concurrence that was satisfactory to Petitioner's trial counsel in showing, according to his testimony at the evidentiary hearing, that there was no breach of the plea argument by the State. Furthermore, the Petitioner can point to nothing in the record that would otherwise support his post-conviction interpretation of the sentencing record, other than arguing that there was not good reason for the defense not to object to the State's argument at sentencing or argue this issue on direct appeal. (*See Petitioner's Ground Seven to Supplemental Petition for Writ of Habeas Corpus (Post–Conviction)*. The simple fact is that the Petitioner's trial and appellate counsel did not object to any breach of the plea agreement since he believed, that there was in fact, none.

Additionally, as to appellate issues, in *Morales v. State* (Nev., 2014) the Nevada Supreme Court held that to prove ineffective assistance of appellate counsel a petitioner "must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that the omitted issue would have a reasonable probability of success on appeal," *citing Kirksey v. State,* 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996), *Morales, supra* at page 8. The *Morales* court noted that "Appellate counsel is not required to raise every non-frivolous issue on appeal," *citing Jones v. Barnes,* 463 U.S. 745, 751 (1983), and that "[r]ather, appellate counsel will be most effective when every conceivable issue is not raised on appeal," *citing Ford v. State,* 105 Nev. 850, 853, 784 P.2d 951, 953 (1989), *Morales, supra* at page 8. Thirdly, the *Morales* court also noted that "[b]oth components of the inquiry must be shown," citing *Strickland v. Washington,* 466 U.S. 668, 697 (1984), and that they will "give deference to the court's factual findings if supported by substantial evidence and not clearly erroneous but review the court's application of the law to those facts de novo," *citing Lader v. Warden,* 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005), *Morales, supra* at page 9. At the evidentiary hearing in this case, appellant counsel testified that he raised on appeal the two

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

issues that he felt that had the most merit, and that even if there was some nefarious argument that the State could have been alleged to have breached the pleas agreement in this case, under *Morales, supra,* Appellate counsel obviously did not believe that it had any merit since on appeal, as he was not required to raise every conceivable appellate issue that he felt had any chance of success on appeal.

Finally, there is no evidence in the record presented to the Court that the sentencing Court relied on impalpable or highly suspect evidence under *Silks v. State*. 92 Nev. 91, 545 P.2d 1159 (1976), or that the sentencing court abused its discretion at sentencing, since the Nevada Supreme Court has held that a sentence of imprisonment which is within the limits of a valid statute, regardless of its severity, is normally not considered cruel and unusual punishment in the constitutional sense. *Schmidt v. State*, 94 Nev. 665, 584 P.2d 695 (1978). *See also United States v. Johnson*, 507 F.2d 826 (7th Cir. 1974), Cert. den. 421 U.S. 949, 95 S.Ct. 1682, 44 L.Ed.2d 103 (1975). As a result, the Petitioner's seventh supplemental allegation lacks merit and must fail.

III.

CLOSING LEGAL ARGUMENTS

(a) SEARCH WARRANT ISSUES

The evidence presented at the evidentiary hearing in this matter, especially from Winnemucca Police Department Officer Elizabeth Hill and Humboldt County Sheriff's Office Detective David Walls, was that the law enforcement officers, after initially knocking at the Petitioner's residence, gathered away from Petitioner's hotel room to plan what their next move was. At this time, according to Officer Hill, the manager of the hotel by his own violation went up to the Petitioner's hotel room and opened it up unbeknownst to law enforcement in the area. Nether officer here testified that they asked or directed the hotel manager to open the Petitioner's hotel room. Once the room was open, Officer Hill and Detective Walls testified that they then

271

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

conducted a "protective sweep" to make sure for their own safety that there was no one in the Petitioner's hotel room, and in only so doing, Officer Hill noticed in plain view property she had prior knowledge of was stolen property. Thereafter, a search warrant was later legally obtained for Petitioner's hotel room from the Justice Court of Union Township, Humboldt County, Nevada which resulted in the recovery of stolen property.

The United States Supreme Court has identified exceptions to the warrant requirement for searches. One such exception is a "protective sweep" under *Maryland v. Buie*, 494 U.S. 327 (1990), where the Court held that "A 'protective sweep' is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others. It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding." *Maryland v. Buie, 494 supra at 327.* Under *United States v. Lemus*, 582 F.3d 958, 962 (9th Cir. 2009) the 9th Circuit Court of Appeals stated "[a] protective sweep is permitted if the searching officer "possesse[d] a reasonable belief based on 'specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant[ed]' the officer in believing . . . that the area swept harbored an individual posing a danger to the officer or others." Id. (citation omitted) (alterations in original). "This 'protective sweep' is not a license to search every nook and cranny of a house, but is subject to two significant limitations: it 'extend[s] only to a cursory inspection of those spaces where a person may be found' and lasts 'no longer than it takes to complete the arrest and depart the premises.'" *United States v. Lemus*, 582 U.S. *supra* at 962, *quoting Buie*, 494 U.S. at 335-36.

In the present case, based on the Petitioner's known conduct of previously threatening former family members, the Petitioner posed a danger to officer safety justifying the protective sweep in this case, even after they had previously knocked at his room and there was no answer, a probable indication that the Petitioner may not have wanted to be found or discovered. *See*

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

State v. Lisenbee, 116 Nev. 1124, 13 P.3d 947, (2000), where the defendant's prior conduct, in the dissent, was noted as a factor in the legal analysis of a protective sweep. *See Lisenbee,* 13 P.3d *supra* at 953, Justice J. Young and C.J. Rose dissenting.

When asked about the viability of the search warrant issue in this case, Petitioner's trial counsel testified at the evidentiary hearing in this matter that he believed that it did not have any merit. As a result, it is hard to see how whether or not to raise the search issue in this case was not a typical strategic decisions made by trial counsel, which strategic decisions are assumed to be intentional and are "virtually unchallengeable," under *Doleman, supra* 112 Nev. at 848, 921 P,2d at 280 (quoting *Howard v. State*, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990).

Finally, the Petitioner has failed to meet the second prong of *Strickland, supra*, by establishing "prejudice" by a showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *(Strickland, supra, 466 U.S at 687.)* As a result, Petitioner's allegations of ineffective assistance of counsel as to the search warrant issues are groundless since Petitioner's decision to plead guilty negated any tactical trail strategy decisions that would have been made if the case had proceeded to trial.

(b) SEVERENCE ISSUE

The Petitioner raises again allegations of ineffective assistance of counsel, listed as ground 4, in his Supplemental Petition for Writ of Habeas Corpus (Post-Conviction), in that his trial counsel failed to file a motion to sever his cases into two cases. *(See Petitioner's Supplemental Petition for Writ of Habeas Corpus (Post-Conviction), page 13-15).* This contention lacks merit because under NRS 174.155, joinder is discretionary, not mandatory, and any decision to do would be a trial strategy decision "virtually unchallengeable" under *Doleman, supra.* As a result, Petitioner's allegation of ineffective assistance of counsel as to severance lacks merit as well.

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

IV.

CLOSING SUMMARY LEGAL ARGUMENTS

In the present case, the evidence is clear from the record that the Petitioner knowing and voluntarily entered his plea of guilty to three (3) counts of Aggravated Stalking, a Category B. Felony, in violation of NRS 200.575(2), to avoid, by his own testimony and that of his trial counsel, the potentiality of habitual offender charge pursuant to NRS 207.010. By pleading guilty therefore, the Petitioner negated the possibility that he could have raised other issues at trial, such as his lack of intent to commit the crime at issue, and that any decisions to raise this and the other issues as noted in his Original and Supplemental Writ for Habeas Corpus (Post-Conviction), would have been simply trial strategy decisions "virtually unchallengeable" under *Doleman, supra* 112 Nev. at 848, 921 P.2d at 280 (*quoting Howard v. State*, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990), strategic decisions based on an incomplete investigation are reasonable "precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland, supra* 466 U.S. at 690-91).

Finally, under *Stevenson v. State*, 131 Nev. Adv. Op. 61, 354 P.3d 1277, 1281 (2015), the Nevada Supreme Court noted that time constraints and pressure from interested parties exist in every criminal case, and that from the record there, there was no indication that their presence prevented the defendant from making a voluntary and intelligent choice among the options by pleading guilty to avoid being charged as a habitual criminal. *Stevenson, supra* at 354 P.3d at 1282-83. As a result, in the present case, in reviewing the totality of the sentencing transcript in this case, it is clear that Petitioner knew the consequences of his plea and that the plea was voluntarily and intelligently made.

CONCLUSION

Based on the above legal arguments and all facts and pleadings herein, the Petitioner has

failed on all of his allegations of Nevada Statutory and U.S. Constitutional error alleged in his Original and Supplemental Petitions for Writ of Habeas Corpus (Post-Conviction). Accordingly, it is respectfully requested that this Court deny the Petitioner's Original and Supplemental Petitions for Writ of Habeas Corpus (Post-Conviction) in their entirety.

DATED this 16th day of November, 2018.

ANTHONY R. GORDON
Deputy District Attorney

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) I certify that I am an employee of the Humboldt County District Attorney's Office, and that on the 16 day of November, 2018, I delivered a copy of the **STATE'S RESPONSE TO GROUND SEVEN TO PETITIONER'S SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS-(POST CONVICTION)** to:

MELVIN LEROY GONZALES #1018769
Lovelock Correctional Center
1200 Prison Road
Lovelock, NV 89419

KARLA K. BUTKO, ESQ.
1030 Holcomb Ave.
Reno, Nevada 89502

ADAM PAUL LAXALT
Nevada Attorney General
100 N. Carson Street
Carson City, NV 89701

(X) U.S. Mail
( ) Certified Mail
( ) Hand-delivered
( ) Placed in DCT Box
( ) Via Facsimile

State Bar No. 3307
1030 Holcomb Ave.
Reno, Nevada 89502
(775) 786-7118
Attorney for Petitioner

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF HUMBOLDT

MELVIN LEROY GONZALES,

Petitioner,

vs. Case No. CV 20,547

THE STATE OF NEVADA, Dept. No. 2

Respondent.
_____/

REPLY TO STATE'S RESPONSE TO GROUND SEVEN TO SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

This Reply is made to the State's Response to Ground Seven as well as the State's closing argument filed on November 16, 2018.

A. **Ground Seven**: Breach of plea: Respondent relies heavily upon the decision of Mr. Cochran not to object to the obvious breach of the plea bargain that occurred. Yet, the failure to object to the State's improper argument cannot be justified. The State's argument was for prison time in excess of the plea agreement. The State agrees to recommend that the penalty on each count run concurrent to each other. Yet, at sentencing, Mr. Pasquale improperly argued for the recommendation of the PSI, which recommended consecutive time on Counts I & II, but concurrent time on Count III. The concurrence with the PSI was not the plea bargain between the parties. Mr. Cochran's job was to fight for the plea bargain that he garnered and sway the Court into adopting the parties resolution. Mr. Cochran was wrong. There was a breach of the plea bargain. This Court cannot rely upon trial counsel's failures to justify finding trial counsel

effective. It is hard to understand how the State could argue that there was no breach of the plea bargain. This issue is really that simple and clear. The State could not argue for consecutive terms, but it did.

Mr. Cochran recalled the plea bargain as it was in the documents and as presented to the Court during the actual guilty plea, the State would recommend concurrent sentences. P37, Post Conviction Hearing Transcript. (PCHT).

B. Search Warrant issues:

The testimony of Officer Hill was clear that the officer had a copy of the rental agreement and knew that Mr. Gonzales was the lawful resident of the room at the Economy Inn. PCHT9, 14. Officer Hill testified incredibly that the manager's son opened the hotel room door on his own accord and not at the request of the police. PCHT 14, 17. Officers had already told the manager's son not to open the door. PCHT 17. Nothing changed between the time the door was opened for the police and when the police admitted they did not have the right to enter the hotel room by telling the manager's son not to open the door. Officer Hill knew the room to be unoccupied. PCHT 16. The police then did a protective sweep, without a warrant. The police then used that information from the protective sweep to gain a search warrant. PCHT 9, 10. Mr. Gonzales was not present and did not grant consent. PCHT 11, 167 18.

Officer Walls testified that the threats case was based upon texting and telephonic contact and there was never any type of location that Mr. Gonzales was at near them when the threats were made. PCHT 22.Officer Walls testified that during their conversation with the manager's son (Jared Rogers) of the Economy Inn, the manager opened Mr. Gonzales unit door. He then entered for a protective sweep. PCHT 24. Nobody was in the room. PCHT 25. The police had knocked on the door, announced their presence, saw no sign of movement in side the room and did not hear anything that would indicate the room was occupied. PCHT 25. Once Mr. Rogers opened the door, Officer Hill stated that the room had stolen property she was looking for inside the room. PCHT 31. Mr. Gonazles had the key to the hotel room on his person when he was

arrested about ten minutes later at a different location. PCHT 33.

Officers had no reason to believe that Mr. Gonzales was inside the hotel room. Officers had knocked on the door, announced their presence, saw no movement, heard no noise and were leaving when the door was opened by Mr. Rogers. There was no arrest warrant for Mr. Gonzales and no search warrant in hand. This is not a hot pursuit case. Officer Walls had the information about Mr. Gonzales from his earlier shift, at least 12 hours before. This was not an emergency entry case. This was investigative, with Officer Hill looking for stolen property. The leading case is *Hannon v. State*, 125 Nev. 142, which adopted the *Brigham City* standard, and which case supports the fact that Officer Hill and Officer Walls did not have objective information to justify the warrantless entrance into Mr. Gonzales motel room. *Brigham City v. Stuart*, 547 U.S. 398, 404 (2006).

This search was not like that in *Maryland v. Buie*, 494 U.S. 327 (1990), as Mr. Gonzales was not present and in the process of being arrested. Police had no reason to conduct a sweep of his empty motel room. There must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene. Those facts are noticeably missing in this setting. *Hayes v. State*, 106 Nev. 543 (1990). Counsel was ineffective for failing to file pretrial motion work on this case.

C. Severance issue:

The State argued that the decision not t sever the completely differing charges into an appropriate case was tactical in nature and virtually unchallengeable. The district court has an ongoing duty to consider the prejudice of joined charges and grant a severance if prejudice appears. See *Schaffer v. United States*, 362 U.S. 511, 516 (1960); see also *Coleman,* 22 F.3d at 134. Unfair prejudice abounds in the record before this court. The stolen property charges have nothing to do with the texting or voicemail. This Court would have no reason to consider those alleged actions when imposing this sentence. The interests of judicial economy were only

279

marginally served as there would be virtually no overlapping testimony. See United States v. Richardson, 161 F.3d 728, 734 (D.C. Cir. 1998).

Severance was required by NRS 174.165(1) because the joinder was unfairly prejudicial. The reality in this setting was that counsel filed no motion work, had the client enter into a plea bargain that trial counsel did not even protect from a breach of the plea by the State. Counsel was ineffective under the 6th & 14th Amendments.

These offenses were not part of a similar scheme. These offenses did not involve the same type of conduct or the same victims. *Tabish v. State*, 119 Nev. 293, 303, 72 P.3d 584, 591 (2003). Defense counsel should have moved to sever the different date offenses and type of offenses into its own case. This would have benefitted the defense and allowed for proper motion work to have been filed.

For separate trials to be required, the simultaneous trial of the offenses must render the trial fundamentally unfair, and hence, result in a violation of due process. *Rimer v. State*, 131 Nev., Adv. Op. 36, 351 P.3d 697, 709 (2015) (quoting *Honeycutt v. State*, 118 Nev. 660, 667-68, 56 P.3d 362, 367 (2002), overruled on other grounds by *Carter v. State*, 121 Nev. 759, 765, 121 P.3d 592, 596 (2005).

The bottom line is that little work was done in the defense of this client. His prison term is more significant than one seen in a case where a victim is actually harmed.

Counsel's performance was deficient and that the deficiency prejudiced Mr. Gonzales. *Strickland*, 466 U.S. at 687; *Strickland v. Washington*, 466 U.S. 668 (1984),. This Petition should be granted by the Court.

Dated this 26 day of November, 2018.

By: Karla K. Butko

KARLA K. BUTKO, Esq.
P. O. Box 1249
Verdi, NV 89439
(775) 786-7118
State Bar No. 3307

280

CERTIFICATE OF SERVICE

Pursuant to NRCP 5, I certify that I am an employee of Karla K. Butko, 1030 Holcomb Avenue, Reno, NV 89502, and that on this date I caused the foregoing document to be delivered to all parties to this action by

X placing a true copy thereof in a sealed, stamped envelope with the United States Postal Service at Reno, Nevada.

_____ personal delivery

_____ Facsimile (FAX)

_____ Federal Express or other overnight delivery

_____ Reno/Carson Messenger Service

addressed as follows:

Anthony Gordon, Esq.
Humboldt County District Attorney's Office
P. O. Box 909
Winnemucca, NV 89446

DATED this 26 day of November, 2018.

KARLA K. BUTKO

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the Social Security Number of any person.

DATED this 26 day of November, 2018.

KARLA K. BUTKO, ESQ.

Case No. CV 20,547

Dept. No. 2

FILED

2019 FEB -1 AM 9:12

TAMI RAE SPERO
DIST. COURT CLERK

IN THE SIXTH JUDICIAL DISTRICT COURT OF

STATE OF NEVADA IN AND FOR THE COUNTY OF HUMBOLDT

Melvin Leroy Gonzales,

Petitioner,

vs.

NOTICE OF ENTRY OF ORDER

The State of Nevada,

Respondent./

PLEASE TAKE NOTICE that on February 1, 2019, the Court entered a decision or order in this matter, a true and correct copy of which is attached to this notice.

You may appeal to the Supreme Court from the decision or order of this Court. If you wish to appeal, you must file a Notice of Appeal with the Clerk of this Court within 33 days after the date this notice is mailed to you. This notice was mailed on February 1, 2019.

DATED February 1, 2019

TAMI RAE SPERO, CLERK OF THE COURT

(SEAL)

By _____
Clerk

282

CASE NO. CV 20,547

DEPT. NO. II

FILED

2019 FEB -1 AM 8:24

TAMI RAE SPERO,
DIST. COURT CLERK

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF HUMBOLDT
-o0o-

SIXTH JUDICIAL DISTRICT COURT
• HUMBOLDT COUNTY, NEVADA •
MICHAEL R. MONTERO
DISTRICT JUDGE

MELVIN LEROY GONZALES,

Petitioner,

vs.

THE STATE OF NEVADA,

Respondent.

_____/

ORDER

FINDINGS OF FACT

This matter came before this Court for an Evidentiary Hearing on October 16, 2018, to discuss the merits of Petitioner Melvin Leroy Gonzales's timely *Petition for Writ of Habeas Corpus (Post-Conviction)*, filed November 16, 2015. Also discussed at the October 16, 2018, Evidentiary Hearing was Petitioner's *Supplemental Petition for Writ of Habeas Corpus (Post-Conviction)*, filed May 15, 2017.

The State filed *State's Evidentiary Hearing Brief and Response to Petitioner's Writ of Habeas Corpus (Post Conviction)* on October 4, 2018. On October 5, 2018, the State filed its *Amended State's Evidentiary Hearing Brief and Response to Petitioner's Supplemental Petition for Writ of Habeas Corpus (Post Conviction)*.

283

Thereafter, with permission from this Court, Petitioner filed *Ground Seven to Supplemental Petition for Writ of Habeas Corpus (Post-Conviction)* on October 18, 2018. The State responded on November 16, 2018, with *State's Response to Ground Seven to Supplemental Petition for Writ of Habeas Corpus (Post Conviction)*. Finally, Petitioner filed his *Reply to State's Response to Ground Seven to Supplemental Petition for Writ of Habeas Corpus (Post Conviction)* and *Request for Submission* on November 27, 2018.

On January 7, 2014, Petitioner entered Guilty pleas to three counts of Aggravated Stalking. The Trial Court accepted Petitioner's pleas and sentenced him as to all counts on April 15, 2014. At all relevant times, Petitioner was represented by Steven Cochran, Esq.

CONCLUSIONS OF LAW

Petitioner raises a total of eight Grounds for relief in his *Petition for Writ of Habeas Corpus (Post-Conviction)*. Petitioner raises an additional seven Grounds for relief between his *Supplemental Petition for Writ of Habeas Corpus (Post-Conviction)* and *Ground Seven to Supplemental Petition for Writ of Habeas Corpus (Post-Conviction)*. This Court will consider each Ground for relief individually.

I. Petitioner's *Petition for Writ of Habeas Corpus (Post-Conviction)*

Petitioner alleges multiple grounds of Ineffective Assistance of Counsel under a single Ground for relief. This Court will consider each argument as a separate Ground and consider cumulative error at the end of this Section.

Ground 1. Ineffective Assistance of Counsel: Waiving the Preliminary Hearing

Petitioner alleges that Counsel lied to him and stated that if he did not plead guilty, he would spend life in prison under the habitual criminal statute. In sum, Petitioner alleges deceit

and coercion by Counsel, leading him to waive his preliminary hearing and enter a guilty plea.

As to Petitioner's arguments regarding waiving his preliminary hearing, this Court must dismiss a petition if it determines that a petitioner plead guilty and the petition is not based on 1) an involuntarily or unknowingly entered plea, or 2) the plea was entered without effective assistance of counsel. NEV. REV. STAT. § 34.810(1)(a). This Court will review a defaulted claim if the failure to review the claim would cause a fundamental miscarriage of justice. *Mazzan v. Whitley*, 112 Nev. 838, 843, 921 P.2d 920, 923 (1996).

Petitioner plead Guilty to all three counts of Aggravated Stalking. Issues regarding Petitioner's preliminary hearing are outside the scope of NRS 34.810(1)(a). Petitioner has failed to show that a miscarriage of justice has occurred. Therefore, as to that specific argument, this Ground for relief is dismissed.

Petitioner alleges in his *Petition for Writ of Habeas Corpus (Post-Conviction)* that he was promised concurrent sentences and treatment if he plead guilty. Counsel testified that he made no such promises. Evidentiary Hearing Transcript at 46 [hereinafter EHT]. Most importantly, Petitioner's assertion is directly contradicted by Petitioner's own testimony at the Evidentiary Hearing. EHT at 77. Therefore, this Ground for relief lacks merit.

Ground 2. Ineffective Assistance of Counsel: Counsel's Failure to Request Permission of the Court to Retain Certain Expert Witnesses

Petitioner alleges that Counsel was ineffective when he failed to request a new evaluation of Petitioner to determine if he was competent to accept a plea, waive his preliminary hearing, form the requisite intent for the crimes he was charged with, and to mitigate his sentence. This Court must dismiss a petition if it determines that a petitioner plead guilty and the petition is not based on 1) an involuntarily or unknowingly entered plea, or 2)

the plea was entered without effective assistance of counsel. NEV. REV. STAT. § 34.810(1)(a). This Court will review a defaulted claim if the failure to review the claim would cause a fundamental miscarriage of justice. *Mazzan*, 112 Nev. at 843, 921 P.2d at 923.

As stated above, Petitioner plead guilty to three counts of Aggravated Stalking. Therefore, this Court dismisses Petitioner's arguments regarding his preliminary hearing, competency as to whether he formed the requisite intent for the crimes charged, and mitigation at sentencing. All three are outside the scope of NRS 34.810(1)(a). Further, Petitioner has failed to show that a miscarriage of justice has occurred.

This Court also finds no merit in Petitioner's allegation that Counsel was ineffective when he failed to request a second evaluation of Petitioner. Petitioner alleges that Counsel should have been able to tell that Petitioner was not "lucid."

Claims alleging specific instances of a trial counsel's deficiencies, as opposed to a complete failure by a trial counsel to try the case, are governed by *Strickland v. Washington* 466 U.S. 668 (1984). *See Bell v. Cone,* 535 U.S. 685, 697–98, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002) (referencing *Strickland v. Washington*, 466 U.S. 668 (1984)).

Strickland sets forth a two-prong test requiring a petitioner to show that his counsel's performance fell below an objective standard of reasonableness and that his counsel's deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687-88.

Under the first prong, "[j]udicial scrutiny of a counsel's performance must be highly deferential." *Id.* at 689. Further, a counsel's challenged conduct must be evaluated from his perspective at the time. *Id.* Importantly, "the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'"

Strickland, 466 U.S. at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.Ed. 83 (1955)); *see also Dawson v. State*, 108 Nev. 112, 117, 825 P.2d 593, 596 (1992) (holding "[s]trategic choices made by counsel after thoroughly investigating the plausible options are almost unchallengeable"). A trial counsel's failure to make futile efforts cannot be deemed ineffective assistance of counsel. *Donovan v. State*, 94 Nev. 671, 675, 584 P.2d 708, 711 (1978).

Under the second prong, "the defendant must show a reasonable probability that, but for counsel's errors, the result of the trial would have been different." *Kirksey v. State*, 112 Nev. 980, 988, 923 P.2d 1102, 1107 (1996). An insufficient showing as to either *Strickland* prong is fatal to a claim of ineffective assistance of counsel. *Strickland*, 466 U.S. at 697. The petitioner must prove disputed factual allegations underlying his ineffective assistance of counsel claim by a preponderance of the evidence. *Means v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004).

Here, Counsel was aware of an evaluation of Petitioner finding him competent. EHT at 65. In addition, Counsel testified that he did not see any signs that Petitioner was having difficulty understanding him. EHT at 45. Further, Counsel certified in the *Guilty Plea Agreement* that to the best of his knowledge and belief, Petitioner was competent and understood the charges and consequences of the guilty pleas. *State v. Gonzales*, Case No. CR 13-6257, *Guilty Plea Agreement* at 9-10 (filed Jan. 7, 2014).

Importantly, other than his own testimony, Petitioner failed to provide this Court with any evidence, scientific or otherwise, that Petitioner was in a mental state inhibiting him from knowingly and voluntarily entering his pleas.

Finally, Petitioner was thoroughly canvassed by the Trial Court as to his ability to understand the consequences of pleading guilty and his ability to do so. Arraignment Transcript at 12-14 [hereinafter AT]. Petitioner had the chance to explain his alleged inability to understand his pleas at his arraignment. He also could have expressed these alleged issues to his attorney at any time. This Court finds that Petitioner failed to do so. His testimony to the contrary is self-serving and unreliable.[1]

There is no indication that Counsel fell below an objective standard of reasonableness and no evidence that Petitioner was actually prejudiced. Therefore, this Court finds this Ground for relief meritless.

Ground 3. Ineffective Assistance of Counsel: Counsel's Failure to Interview Witnesses

Petitioner argues that Counsel was ineffective for failing to interview witnesses. This Court must dismiss a petition if it determines that a petitioner plead guilty and the petition is not based on 1) an involuntarily or unknowingly entered plea, or 2) the plea was entered without effective assistance of counsel. NEV. REV. STAT. § 34.810(1)(a). This Court will review a defaulted claim if the failure to review the claim would cause a fundamental miscarriage of justice. *Mazzan*, 112 Nev. at 843, 921 P.2d at 923.

Petitioner plead Guilty to all three counts of Aggravated Stalking. Whether Counsel was ineffective for failing to interview witnesses is outside the scope of NRS 34.810(1)(a). Further, Petitioner has failed to show that a miscarriage of justice occurred. Therefore, this Ground for relief is dismissed.

[1] Petitioner appears to have an excellent memory of the proceedings despite his alleged inability to enter his pleas knowingly and voluntarily at that time. *See* EHT at 75-90.

Ground 4. Ineffective Assistance of Counsel: Counsel Threateningly Induced Petitioner into Signing the Plea Agreement

Petitioner alleges that Counsel lied to him and threatened that Petitioner would spend the rest of life in prison if he failed to take the plea deal. This assertion is directly at odds with the record. Petitioner testified at the Evidentiary Hearing that Counsel explained to him that the plea agreement contained everything that was being promised. EHT at 77. There is no indication that Counsel promised him any other terms outside what was contained in the plea agreement or that Counsel lied to Petitioner in any way. *See* EHT at 45-46.

As to Petitioner's allegation of threats, Petitioner clearly stated at the Evidentiary Hearing that Counsel told him: "best thing for you to do is sign this plea so you don't get the habitual." EHT at 89. Even Petitioner's rendition of Counsel's statements fail to show that Counsel threatened or lied to Petitioner regarding the possible outcomes of the case. Counsel merely stated his opinion. EHT at 40-41. There is no indication that Counsel's actions fell below an objective standard or reasonableness or that Petitioner was prejudiced. Therefore, this Ground for relief is without merit.

Ground 5. Ineffective Assistance of Counsel: Counsel's Failure/Refusal to File a Motion to Withdraw Guilty Plea

Again, Petitioner alleges that Counsel lied to him regarding the plea agreement. As noted above, this assertion is without merit and not supported by the record. Petitioner also renews his argument that he was not able to understand the plea agreement because of the "psychotropic medications" he was taking. Petitioner, in relying on these arguments, asserts that he instructed Counsel to withdraw his guilty plea after receiving a sentence he did not expect.

This Court must dismiss a petition if it determines that a petitioner plead guilty and the petition is not based on 1) an involuntarily or unknowingly entered plea, or 2) the plea was entered without effective assistance of counsel. NEV. REV. STAT. § 34.810(1)(a). This Court will review a defaulted claim if the failure to review the claim would cause a fundamental miscarriage of justice. *Mazzan*, 112 Nev. at 843, 921 P.2d at 923.

Again, Petitioner alleges that his plea was entered involuntarily. This Court found no merit in those arguments. As to Petitioner's alleged request to withdraw his guilty plea, this claim likely falls outside the scope of permissible post-conviction grounds for relief because it deals with withdrawing a plea as opposed to entering the plea.

Setting aside the question of the possible dismissal of this argument on procedural grounds. This Court finds that other than Petitioner's self-serving statement that he made the request to withdraw his pleas, there is no other indication that such a request was actually made. EHT at 78. Further, the underlying arguments leading up to Petitioner allegedly requesting to withdraw his pleas are refuted by the record. Therefore, this Ground for relief is meritless.

Ground 6. Petitioner was Unaware as to the True Nature and Consequences of his Pleas

Once again, Petitioner argues that he did not enter his pleas knowingly, voluntarily, and was unable to understand the true nature and consequences of his pleas. Petitioner once again blames the medication he was on at the time of entering his plea. As discussed above, the record does not support Petitioner's assertions. Further, Petitioner failed to present any additional evidence beyond his own testimony supporting his allegations. This Court finds Petitioner's arguments without merit. Therefore, this Ground for relief is dismissed.

Ground 7. Cruel and Unusual Punishment Inflicted During Sentencing Procedure

Petitioner re-alleges multiple arguments regarding his inability to enter his guilty plea due to his alleged mental instability. This Court will not address those arguments again. As to those arguments, this Ground for relief lacks merit.

Petitioner takes issue with the sentence imposed upon him. This Court must dismiss a petition if it determines that a petitioner plead guilty and the petition is not based on 1) an involuntarily or unknowingly entered plea, or 2) the plea was entered without effective assistance of counsel. NEV. REV. STAT. § 34.810(1)(a). This Court will review a defaulted claim if the failure to review the claim would cause a fundamental miscarriage of justice. *Mazzan*, 112 Nev. at 843, 921 P.2d at 923.

Petitioner plead Guilty to all three counts of Aggravated Stalking. Issues regarding his sentence are outside the scope of NRS 34.810(1)(a). Further, Petitioner has failed to show that any miscarriage of justice took place. Even if he had made a sufficient showing, Petitioner was well aware that the Trial Court was not bound by the plea agreement at sentencing. AT at 4-5; EHT at 85. Therefore, this Ground for relief is dismissed in its entirety.

Ground 8. Cumulative Error

Petitioner argues that the culmination of error by Counsel entitles him to relief. Given that Petitioner has failed to demonstrate error in any nature, or prejudice from the alleged error, an argument of cumulative error lacks meritless. This Ground for relief is dismissed.

II. Petitioner's *Supplemental Petition for Writ of Habeas Corpus (Post-Conviction)* and *Ground Seven to Supplemental Petition for Writ of Habeas Corpus (Post-Conviction).*

Petitioner alleges an additional seven Grounds for relief in his *Supplemental Petition*

for Writ of Habeas Corpus (Post-Conviction) and *Ground Seven to Supplemental Petition for Writ of Habeas Corpus (Post-Conviction)*. These Grounds are discussed individually.

Ground 1. Ineffective Assistance of Counsel: Failed to Litigate Fourth Amendment Issue

Petitioner alleges that Counsel was ineffective when he failed to litigate Fourth Amendment issues regarding a warrantless search. This Court must dismiss a petition if it determines that a petitioner plead guilty and the petition is not based on 1) an involuntarily or unknowingly entered plea, or 2) the plea was entered without effective assistance of counsel. NEV. REV. STAT. § 34.810(1)(a). This Court will review a defaulted claim if the failure to review the claim would cause a fundamental miscarriage of justice. *Mazzan*, 112 Nev. at 843, 921 P.2d at 923.

Petitioner plead Guilty to all three counts of Aggravated Stalking. This issue is outside the scope of NRS 34.810(1)(a). Further, Petitioner has failed to show that any miscarriage of justice took place. Therefore, this Ground for relief is dismissed.

Ground 2. Ineffective Assistance of Counsel: Inadequate Investigation/Mental Health Issues; Inability to Formulate Criminal Intent

Petitioner alleges that Counsel was ineffective when he failed to investigate. Petitioner reasons that had Counsel properly investigated, he would have discovered that Petitioner did not have the requisite intent to commit the crimes charged. Petitioner raised a similar argument in his *Petition for Writ of Habeas Corpus (Post-Conviction)*.

This Court must dismiss a petition if it determines that a petitioner plead guilty and the petition is not based on 1) an involuntarily or unknowingly entered plea, or 2) the plea was entered without effective assistance of counsel. NEV. REV. STAT. § 34.810(1)(a). This Court

will review a defaulted claim if the failure to review the claim would cause a fundamental miscarriage of justice. *Mazzan*, 112 Nev. at 843, 921 P.2d at 923.

Petitioner plead Guilty to all three counts of Aggravated Stalking. This issue is outside the scope of NRS 34.810(1)(a). To the extent, if any, that this Ground for relief pertains to Petitioner's ability to enter his guilty plea, those issues have been thoroughly discussed above. Petitioner has failed to show the existence of a miscarriage of justice. Therefore, this Ground for relief is dismissed.

Ground 3. The Guilty Plea was Coerced by Counsel, Thus the Pleas Were Involuntarily Made

Petitioner argues that absent Counsel's advice regarding the possibility of receiving habitual criminal status, he would not have entered into the plea agreement. As stated multiple times throughout this **ORDER**, this Court has found no evidence of coercion or threats in the record. Petitioner entered his plea knowingly, voluntarily, and with a complete understanding of nature of the offense and the related consequences. AT at 14. Therefore, this Ground for relief is meritless.

Ground 4. Ineffective Assistance of Counsel: Counsel Should Have Filed a Motion for Severance of the Charges

Petitioner argues that Counsel was ineffective when he failed to request a separation of the charges resulting in prejudice to Petitioner. As noted previously, this Court must dismiss a petition if it determines that a petitioner plead guilty and the petition is not based on 1) an involuntarily or unknowingly entered plea, or 2) the plea was entered without effective assistance of counsel. NEV. REV. STAT. § 34.810(1)(a). This Court will review a defaulted claim if the failure to review the claim would cause a fundamental miscarriage of justice.

Mazzan, 112 Nev. at 843, 921 P.2d at 923.

Petitioner plead Guilty to all three counts of Aggravated Stalking. This issue is outside the scope of NRS 34.810(1)(a). There is no indication in the record that a miscarriage of justice took place. Therefore, this Ground for relief is dismissed.

Ground 5. Ineffective Assistance of Counsel: Failing Litigate the Proper Charge

Petitioner alleges that Counsel was ineffective for failing to file pre-trial motions to attack the charging document in an effort to get the proper charge brought against Petitioner. In making this argument, Petitioner once again argues that he could not form the requisite intent to commit the crime. Petitioner failed to provide this Court with adequate supporting evidence for this assertion.

Regardless, this Court must dismiss a petition if it determines that a petitioner plead guilty and the petition is not based on 1) an involuntarily or unknowingly entered plea, or 2) the plea was entered without effective assistance of counsel. NEV. REV. STAT. § 34.810(1)(a). This Court will review a defaulted claim if the failure to review the claim would cause a fundamental miscarriage of justice. *Mazzan*, 112 Nev. at 843, 921 P.2d at 923.

Petitioner plead Guilty to all three counts of Aggravated Stalking. Arguments regarding Petitioner's past ability to form the requisite intent of the crimes charged are outside the scope of NRS 34.810(1)(a). There is no indication that a miscarriage of justice occurred. Therefore, this Ground for relief is dismissed.

Ground 6. Ineffective Assistance of Counsel: Failed to Present Mental Health Records at Sentencing

Petitioner argues that his sentence was excessive in light of society's interests. Further, Petitioner alleges that the sentencing analysis was not "reasoned." Petitioner alleges that

Counsel was ineffective at sentencing when he failed to provide the Trial Court with accurate sentencing information.

Again, this Court must dismiss a petition if it determines that a petitioner plead guilty and the petition is not based on 1) an involuntarily or unknowingly entered plea, or 2) the plea was entered without effective assistance of counsel. NEV. REV. STAT. § 34.810(1)(a). This Court will review a defaulted claim if the failure to review the claim would cause a fundamental miscarriage of justice. *Mazzan*, 112 Nev. at 843, 921 P.2d at 923.

Petitioner plead Guilty to all three counts of Aggravated Stalking. Sentencing is outside the scope of NRS 34.810(1)(a). Petitioner has failed to show a miscarriage of justice. Therefore, this Ground for relief is dismissed.

Ground 7. Ineffective Assistance of Counsel: Failed to object to State's Breach of the Plea Bargain

In this Ground for relief, Petitioner argues two forms of ineffective assistance of counsel. First, Petitioner argues that Counsel was ineffective at sentencing when he failed to object to the prosecutor's concurrence "with the recommendation contained in the presentence investigation." Sentencing Transcript at 9. Petitioner also argues that Counsel was ineffective for failing to raise this claim on appeal.

This Court must dismiss a petition if it determines that a petitioner plead guilty and the petition is not based on 1) an involuntarily or unknowingly entered plea, or 2) the plea was entered without effective assistance of counsel. NEV. REV. STAT. § 34.810(1)(a). This Court will review a defaulted claim if the failure to review the claim would cause a fundamental miscarriage of justice. *Mazzan*, 112 Nev. at 843, 921 P.2d at 923.

Petitioner plead Guilty to all three counts of Aggravated Stalking. These arguments

fall outside the scope of NRS 34.810(1)(a) because they concern issues arising at sentencing, not issues concerning entering a plea. Petitioner has failed to show a miscarriage of justice because the Trial Court was not bound by the *Guilty Plea Agreement* or argument from the prosecutor. Therefore, this Ground for relief is dismissed.

CONCLUSION

This Court finds no merit in any of Petitioner's alleged Grounds for relief. Therefore, Petitioner's *Petition for Writ of Habeas Corpus (Post-conviction)*, his *Supplemental Petition for Writ of Habeas Corpus (Post-Conviction)*, and his *Ground Seven to Supplemental Petition for Writ of Habeas Corpus (Post-Conviction)* are **DENIED**.

IT IS SO ORDERED

DATED: January 31, 2019.

HONORABLE MICHAEL R. MONTERO
DISTRICT JUDGE

SIXTH JUDICIAL DISTRICT COURT
HUMBOLDT COUNTY, NEVADA
MICHAEL R. MONTERO
DISTRICT JUDGE

SIXTH JUDICIAL DISTRICT COURT
HUMBOLDT COUNTY, NEVADA
MICHAEL R. MONTERO
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Honorable Michael R. Montero, District Court Judge, Sixth Judicial District Court and am not a party to, nor interested in, this action; and that on February 1st, 2019, I caused to be served a true and correct copy of the enclosed **ORDER** upon the following parties:

Karla K. Butko, Esq.
1030 Holcomb Ave.
Reno, NV 89502
Via U.S. Mail

Michael Macdonald
Humboldt County District Attorney
P.O. Box 909
Winnemucca, NV 89446
Hand-delivered to Humboldt County Courthouse, DCT Box

Aaron Ford
Nevada Attorney General
100 N. Carson St.
Carson City, NV 89701
Via U.S. Mail

Shane M. Bell
Law Clerk

Melvin Leroy Gonzales, Petitioner, vs. The State of Nevada, Respondent.

Sixth Judicial District Court of Nevada, Case No. CV 21547

DECLARATION OF SERVICE

I am a citizen of the United States, over the age of 18 years, and not a party to or interested in this action. I am an employee of the Humboldt County Clerk's Office, and my business address is 50 W 5th Street, Winnemucca, NV 89445. On this day I caused to be served the following document(s):

NOTICE OF ENTRY OF ORDER

__X__ By placing in a sealed envelope, with postage fully prepaid, in the United States Post Office, Winnemucca, Nevada, persons addressed as set forth below. I am familiar with this office's practice whereby the mail, after being placed in a designated area, is given the appropriate postage and is deposited in the designated area for pick up by the United States Postal Service.

__x__ By personal delivery of a true copy to the person(s) set forth below by placement in the designated area in the Humboldt County Clerk's Office for pick up by the person(s) or representative of said person(s) set forth below.

Karla K. Butko, Esq.
1030 Holcomb Ave.
Reno, NV 89502
Via U.S. Mail

Michael Macdonald
Humboldt County District Attorney
PO Box 909
Personal Delivery

Aaron Ford
Nevada Attorney General
100 N. Carson St.
Carson City, NV 89701
Via US Mail

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Executed on February 2, 2019 at Winnemucca, Nevada.

County Clerk

297

KARLA K. BUTKO, ESQ.
State Bar No. 3307
P. O. Box 1249
Verdi, NV 89439
(775) 786-7118
Attorney for Petitioner

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF HUMBOLDT

MELVIN LEROY GONZALES,

Petitioner/Appellant,

vs. Case No. CV20,547

THE STATE OF NEVADA, Dept. No. 2

Respondent.
_____/

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that MELVIN LEROY GONZALES, the Petitioner/Appellant above-named, by and through his counsel, KARLA K. BUTKO, ESQ., hereby appeals to the Supreme Court of Nevada, from the Order denying post-conviction relief dated February 1, 2019, with Notice of Entry of Order dated February 1, 2019.

DATED this 14th day of February, 2019.

Karen K Butko

KARLA K. BUTKO
P. O. Box 1249
Verdi, NV 89439
(775) 786-7118
Attorney for Appellant
State Bar No. 3307

CERTIFICATE OF SERVICE

I, KARLA K. BUTKO, hereby certify that I am an employee of KARLA K. BUTKO, LTD., and that on this date I deposited for mailing, the foregoing document, addressed to the following:

MELVIN LEROY GONZALES
Inmate 1018769
Lovelock Correctional Center
1200 Prison Road
Lovelock, NV 89419

and that on this date I personally served the foregoing document on the parties listed below by delivering a true and correct copy, via Second Judicial District Court e-flex delivery: addressed to the following:

Anthony Gordon, ESQ.
Humboldt County District Attorney's Office
P. O. Box 909
Winnemucca, NV 89446

DATED this 14th day of February, 2019.

KARLA K. BUTKO

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding document DOES NOT CONTAIN the Social Security Number of any person.

DATED this 14th day of February, 2019.

KARLA K. BUTKO

NO. 13CR00049

FILED

2013 FEB -1 AM 9:29

IN THE JUSTICE'S COURT OF UNION TOWNSHIP

COUNTY OF HUMBOLDT, STATE OF NEVADA

-oOo-

STATE OF NEVADA,

Plaintiff,

AMENDED
FELONY COMPLAINT

vs.

MELVIN LEROY GONZALES, JR.
ECONOMY INN #114
WINNEMUCCA, NV 89445
DOB: 04/27/1970,

Defendant. /

PERSONALLY APPEARED BEFORE ME, ROGER WHOMES, Deputy District Attorney, who first being duly sworn, complains and says that the Defendant(s) above-named has within the County of Humboldt, State of Nevada, committed a certain crime which is described as follows:

COUNT I

BURGLARY, A CATEGORY B FELONY AS DEFINED BY NRS 205.060

That the Defendant did knowingly, willfully and unlawfully either by day or by night, enter a house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, vehicle, vehicle trailer, semi-trailer or house trailer, airplane, glider, boat or railroad car with the intent to commit grand larceny or petit

RW/cc

300

larceny, assault or battery on any other person or any felony, in the following manner, to-wit: That on or about the 17th day of January, 2013, at or near the location of 4240 Park Place, Winnemucca, County of Humboldt, State of Nevada, the Defendant entered 4240 Park Place with the intent to commit larceny.

COUNT II

RECEIVING, POSSESSING OR WITHHOLDING STOLEN PROPERTY, A CATEGORY C FELONY AS DEFINED BY NRS 193.130 AND NRS 205.275

That the Defendant did knowingly, willfully and unlawfully, being a person who for his own gain or to prevent the owner from again possessing, buys, receives or withholds property, knowing that the property is stolen or under circumstances as should have caused a reasonable person to know that it is stolen and the property is more than $650.00, but less than $3,500, in the following manner, to-wit: That on or about the 17th day of January, 2013, at or near the location of Economy Inn #114, Winnemucca, County of Humboldt, State of Nevada, the Defendant possessed property owned by John Antista and/or Marvin Repreza.

COUNT III

POSSESSION OF A CONTROLLED SUBSTANCE, A CATEGORY E FELONY AS DEFINED BY NRS 453.336

That the Defendant did willfully, unlawfully, and knowingly, possess a Schedule I controlled substance, in the following manner, to-wit: That on or about the 17th day of January, 2013, at or near the location of Economy Inn #114, Winnemucca, County of Humboldt, State of Nevada, the Defendant possessed Methamphetamine.

///

COUNT IV

AGGRAVATED STALKING, A CATEGORY B FELONY
AS DEFINED BY NRS 200.575(2)(a)

That the Defendant did knowingly, willfully and unlawfully, without lawful authority, engage in a course of conduct that would cause a reasonable person to feel terrorized, frightened, intimidated or harassed, and that person, actually felt terrorized, frightened, intimidated or harassed, and further Defendant threatened with the intent to cause him/her to be placed in reasonable fear of death or substantial bodily harm, in the following manner, to-wit: That on or between January 10, 2013 to January 17, 2013, at or near the location of 4140 Rainbow Road, Winnemucca, County of Humboldt, State of Nevada, the defendant threatened Connie Ramirez, his estranged wife, by saying he would "slit her throat, the throats of her children, and/or her parents, and/or made other threats of death to Connie Ramirez and/or her children.

COUNT V

AGGRAVATED STALKING, A CATEGORY B FELONY
AS DEFINED BY NRS 200.575(2)(a)

That the Defendant did knowingly, willfully and unlawfully, without lawful authority, engage in a course of conduct that would cause a reasonable person to feel terrorized, frightened, intimidated or harassed, and that person, actually felt terrorized, frightened, intimidated or harassed, and further Defendant threatened with the intent to cause him/her to be placed in reasonable fear of death or substantial bodily harm, in the following manner, to-wit: That on or between January 10, 2013 to January 17, 2013, at or near the location of 4140 Rainbow Road, Winnemucca, County of Humboldt, State of Nevada, the defendant threatened Osa Pelett with death.

//

COUNT VI

AGGRAVATED STALKING, A CATEGORY B FELONY AS DEFINED BY NRS 200.575(2)(a)

That the Defendant did knowingly, willfully and unlawfully, without lawful authority, engage in a course of conduct that would cause a reasonable person to feel terrorized, frightened, intimidated or harassed, and that person, actually felt terrorized, frightened, intimidated or harassed, and further Defendant threatened with the intent to cause him/her to be placed in reasonable fear of death or substantial bodily harm, in the following manner, to-wit: That on or between January 10, 2013 to January 17, 2013, at or near the location of 4140 Rainbow Road, Winnemucca, County of Humboldt, State of Nevada, the defendant threatened Richard Pellett with death.

COUNT VII

AGGRAVATED STALKING, A CATEGORY B FELONY AS DEFINED BY NRS 200.575(2)(a)

That the Defendant did knowingly, willfully and unlawfully, without lawful authority, engage in a course of conduct that would cause a reasonable person to feel terrorized, frightened, intimidated or harassed, and that person, actually felt terrorized, frightened, intimidated or harassed, and further Defendant threatened with the intent to cause him/her to be placed in reasonable fear of death or substantial bodily harm, in the following manner, to-wit: That on or between January 10, 2013 to January 17, 2013, at or near the location of 4140 Rainbow Road, Winnemucca, County of Humboldt, State of Nevada, the defendant threatened Marvin Repreza with death.

That complainant knows that said crime occurred and that the Defendant, MELVIN LEROY GONZALES, JR. committed the same based upon the following: because complainant is the Deputy District Attorney, and is in the possession of a crime report or report of investigation written by DAVE WALLS, known to

RW/cc

complainant to be a deputy with the HUMBOLDT COUNTY SHERIFF'S OFFICE.

All of which is contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Nevada. Said Complainant, therefore, prays that a warrant and/or summons may be issued in the name of said Defendant(s) above-named and dealt with according to law.

Furthermore, pursuant to NRS 239B.030, the undersigned hereby affirms this document does not contain the social security number of any person.

ROGER WHOMES
Deputy District Attorney

SUBSCRIBED AND SWORN to before me this 31st day of January, 2013.

CASSIE COLLINS
Notary Public-State of Nevada
APPT. NO. 11-6173-9
My Appt. Expires November 01, 2015

NOTARY PUBLIC

RW/cc

CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of Karla K. Butko, Ltd., P. O. Box 1249, Verdi, NV 89439, and that on this date I caused the foregoing document to be delivered to all parties to this action by

X placing a true copy thereof in a sealed, stamped envelope with the United States Postal Service at Reno, Nevada.

_____ personal delivery

_____ Federal Express or other overnight delivery

_____ Reno/Carson Messenger Service

addressed as follows:

Michael MacDonald
District Attorney of Humboldt County
P. O. Box 909
Winnemucca, NV 89446
ATTN: Anthony Gordon, Esq.

DATED this 10th day of June, 2019.

KARLA K. BUTKO, ESQ.

IN THE SUPREME COURT OF THE STATE OF NEVADA

MELVIN GONZALES,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

SUPREME COURT No. 78152
Dist Ct. Case. CV 20,547

APPEAL FROM JUDGMENT OF THE HONORABLE
MICHAEL MONTERO

SIXTH JUDICIAL DISTRICT COURT

APPELLANT'S APPENDIX

VOLUME ONE

KARLA K. BUTKO, Esq.
Attorney for Appellant
P. O. BOX 1249
Verdi, Nevada 89439
(775) 786-7118
State Bar #: 3307

MICHAEL MACDONALD
Humboldt County District Attorney
Attorney for Respondent
P. O. Box 909
Winnemucca, Nevada 89446
(775) 623-6363
Anthony Gordon, Esq.

INDEX TO APPELLANT'S APPENDIX

VOLUME 1

Document	Pages
Information	1-4
Transcript of Proceedings, Arraignment & Plea (1/7/2014)	5-20
Guilty Plea Agreement	21-30
Judgment of Conviction (04/22/2014)	31-34
Transcript of Proceedings, Sentencing (04/15/2014)	35-54
Fast Track Statement Docket 65768	55-68
Fast Track Response	69-75
Petition for Writ of Habeas Corpus (Post-Conviction)	76-97
State's Response to Petition for Writ of Habeas Corpus (Post-Conviction)	98-115
Supplemental Petition for Writ of Habeas Corpus (Post-Conviction)	116-136
State's Evidentiary Hearing Brief and Response to Petitioner's Writ of Habeas Corpus (Post-Conviction)	137-148
Transcript of Proceedings, Post Conviction Evidentiary hearing (10/042018)	149-245
Amended State's Evidentiary Hearing Brief and Response to Petitioner's Writ of Habeas Corpus (Post-Conviction)	246-250

INDEX TO APPELLANT'S APPENDIX

VOLUME 2

Document	Pages
Amended State's Evidentiary Hearing Brief and Response to ..... Petitioner's Writ of Habeas Corpus (Post-Conviction) continued	251-255
Ground Seven to Supplemental Petition for Writ of Habeas Corpus ... (Post-Conviction)	256-266
State's Response to Ground Seven to Supplemental Petition for ..... Writ of Habeas Corpus (Post-Conviction)	267-276
Reply to State's Response to Ground Seven to Supplemental Petition ..... For Writ of Habeas Corpus (Post-Conviction)	277-281
Notice of Entry of Order and Order Denying Petition for Writ of Habeas Corpus (Postconviction) & Findings of Fact	282-297
Notice of Appeal	298-299
Amended Felony Complaint	300-304

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

NO. CR13-4257
#2

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF HUMBOLDT.

-oOo-

STATE OF NEVADA,

Plaintiff,

vs.

INFORMATION

MELVIN LEROY GONZALES, JR.
DOB: 04/27/1970,

Defendant(s)./

MICHAEL MACDONALD, District Attorney of Humboldt County, Nevada, in the name and by the authority of the State of Nevada, informs the Court:

COUNT I

AGGRAVATED STALKING, A CATEGORY B FELONY AS DEFINED BY NRS 200.575(2)(a)

That the Defendant did knowingly, willfully and unlawfully, without lawful authority, engage in a course of conduct that would cause a reasonable person to feel terrorized, frightened, intimidated or harassed, and that person, actually felt terrorized, frightened, intimidated or harassed, and further Defendant threatened with the intent to cause him/her to be placed in reasonable fear of death or substantial bodily harm, in the following manner, to-wit: That on or between January 10, 2013 to January 17, 2013, at or near the location of 4140 Rainbow

1

Road, Winnemucca, County of Humboldt, State of Nevada, the defendant threatened Connie Ramirez, his estranged wife, by saying he would "slit her throat, the throats of her children, and/or her parents, and/or made other threats of death to Connie Ramirez and/or her children.

COUNT II

AGGRAVATED STALKING, A CATEGORY B FELONY AS DEFINED BY NRS 200.575(2)(a)

That the Defendant did knowingly, willfully and unlawfully, without lawful authority, engage in a course of conduct that would cause a reasonable person to feel terrorized, frightened, intimidated or harassed, and that person, actually felt terrorized, frightened, intimidated or harassed, and further Defendant threatened with the intent to cause him/her to be placed in reasonable fear of death or substantial bodily harm, in the following manner, to-wit: That on or between January 10, 2013 to January 17, 2013, at or near the location of 4140 Rainbow Road, Winnemucca, County of Humboldt, State of Nevada, the defendant threatened Osa Pelett with death.

COUNT III

AGGRAVATED STALKING, A CATEGORY B FELONY AS DEFINED BY NRS 200.575(2)(a)

That the Defendant did knowingly, willfully and unlawfully, without lawful authority, engage in a course of conduct that would cause a reasonable person to feel terrorized, frightened, intimidated or harassed, and that person, actually felt terrorized, frightened, intimidated or harassed, and further Defendant threatened with the intent to cause him/her to be placed in reasonable fear of death or substantial bodily harm, in the following manner, to-wit: That on or between January 10, 2013 to January 17, 2013, at or near the location of 4140 Rainbow Road, Winnemucca, County of Humboldt, State of Nevada, the defendant threatened Richard Pellett with death.

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

2

All of which is contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State of Nevada.

That the names of all witnesses who will testify for the State of Nevada in said action that are known to the District Attorney at the time of the filing of this Information are listed with addresses on the annexed Exhibit "A" and the names of all other witnesses who will testify for the State of Nevada that become known to the District Attorney before time of trial will be endorsed hereon by subsequent Exhibit.

Furthermore, pursuant to NRS 239B.030., the undersigned hereby affirms this document does not contain the social security number of any person.

ROGER WHOMES
Deputy District Attorney

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

2-A

EXHIBIT "A"
INFORMATION
Names and Addresses Known to the District Attorney at the time of Filing of the Information

DEPUTY DAVE WALLS
Humboldt County Sheriff Office
Winnemucca, NV 89445

CONNIE RAMIREZ
565 Smithridge Drive
Reno, NV 89502

OSA PELLETT
4140 Rainbow Road
Winnemucca, NV 89445

RICHARD PELLETT
4140 Rainbow Road
Winnemucca, NV 89445

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

3

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the Humboldt County District Attorney's Office, and that on the 10 day of October, 2013, I delivered a true copy of the **INFORMATION** to:

STEVE COCHRAN
Humboldt County Conflict Counsel
c/o Pershing County Public Defender's Office
PO Box 941
Lovelock, NV 89419

(X) U.S. Mail
( ) Certified Mail
( ) Hand-delivered
( ) Placed in DCT Box
( ) Via Facsimile

Gail Jaegelos/

4

Case No. CR-13-6257

Department II

FILED

2014 JUN 11 PM 2:08

TAMI RAE SPERO
DIST. COURT CLERK

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF HUMBOLDT

ooOoo

THE STATE OF NEVADA,

Plaintiff,

v.

MELVIN LEROY GONZALEZ, JR.,

Defendant.

CD ROUGH DRAFT ARRAIGNMENT

ROUGH DRAFT TRANSCRIPT OF CD PROCEEDINGS

BE IT REMEMBERED that the above-entitled matter came on for hearing on January 7, 2014, before the HONORABLE MICHAEL R. MONTERO, District Court Judge.

The State was present in court and represented by Richard Haas, Humboldt County Deputy District Attorney.

The Defendant was present in court and represented by Steve Cochran, Humboldt County Conflict Counsel.

The Division of Parole and Probation was present in court and represented by Debbie Okuma.

ORIGINAL

WARNING!!

THIS TRANSCRIPT OF PROCEEDINGS IS PRODUCED IN INSTANT FORM. THERE WILL BE DISCREPANCIES BETWEEN THE ROUGH DRAFT AND THE FINAL CERTIFIED VERSION OF THE RECORD BECAUSE THE ROUGH DRAFT HAS NOT BEEN EDITED, PROOFREAD, FINALIZED, INDEXED OR CERTIFIED. THERE WILL ALSO BE SOME DISCREPANCY IN PAGE AND LINE NUMBERS APPEARING IN THE ROUGH DRAFT AND THE EDITED, PROOFREAD, FINALIZED AND CERTIFIED FINAL VERSION.

THIS ROUGH DRAFT IS NOT TO BE QUOTED FROM BY THE GENERAL PUBLIC OR THE MEDIA.

PLEASE CONTACT THE COURT REPORTER IF YOU NEED FURTHER ASSISTANCE AT 775-623-6358.

Winnemucca, Nevada, Tuesday, January 7, 2014

oOo

P R O C E E D I N G S

THE COURT: Case CR-13-6257. Case caption State of Nevada, plaintiff, vs. Melvin Leroy Gonzalez, Jr., defendant.

The record will further reflect the presence of the defendant, Mr. Gonzalez, with counsel Mr. Steve Cochran.

Mr. Richard Haas on behalf of the State.

Ms. Okuma with the Division of Parole and Probation.

This matter is on the Court's calendar today for, I believe, it's a continued arraignment. Yes.

Mr. Gonzalez, the purpose of this arraignment is to inform you of the charges that have been filed against you to advise you of your constitutional rights and to have you enter a plea; do you understand that?

THE DEFENDANT: Yes.

THE COURT: The State of Nevada filed an information on October 10th, 2013, charging you with three counts of aggravated stalking; are you aware of that?

THE DEFENDANT: Yes, I am.

7

THE COURT: Do you have a copy of that information before you today?

THE DEFENDANT: Yes, I do.

THE COURT: Very good. And first, Mr. Gonzalez, your name appears at line 12 and a half, Melvin Leroy Gonzalez, Jr., is that your complete legal name?

THE DEFENDANT: Yes, sir.

THE COURT: Is it spelled correctly on this information?

THE DEFENDANT: Yes, it is.

THE COURT: Do you go by any other names?

THE DEFENDANT: No.

THE COURT: And your date of birth appears there as well; is that correct?

THE DEFENDANT: Yes, it is.

THE COURT: Pardon me?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. And Mr. Cochran, are you requesting a formal reading?

MR. COCHRAN: No, Your Honor.

THE COURT: And Mr. Gonzalez, are you familiar with the contents of this information?

THE DEFENDANT: Yes, I am.

THE COURT: So you understand what the State has charged you with?

THE DEFENDANT: Yes.

THE COURT: And you understand it's three counts of aggravated stalking?

THE DEFENDANT: Yes, sir.

THE COURT: With regards to each of these counts of aggravated stalking, do you understand what the State would have to prove in order to convict you of these crimes?

THE DEFENDANT: Yes.

THE COURT: And if convicted of these crimes, you understand the Court could sentence you to a minimum of two years to a maximum of 15 years in the Nevada Department of Corrections. You may also be fined up to $5,000. And this is for each of these three counts; do you understand that?

THE DEFENDANT: Yes.

THE COURT: And these are offenses to which you may be eligible for probation; do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And also, considering that there are three counts of aggravated stalking, at the time of sentencing, the Court could sentence you to concurrent or consecutive sentences; do you understand that?

THE DEFENDANT: Yes.

THE COURT: You understand that sentencing for this crime will be wholly within the discretion of the Court?

THE DEFENDANT: Yes, sir.

THE COURT: And it appears that the guilty plea agreement provides that both sides, the State and your attorney, will -- are free to argue at the time of sentencing. So you understand that this sentence will be for the Court to determine?

THE DEFENDANT: Yes.

THE COURT: Okay. And I failed to ask you about this, but it appears you waived your right to a preliminary hearing in justice court; is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: And you understood that you had the right to a preliminary hearing?

THE DEFENDANT: Yes.

THE COURT: Have you had an opportunity to discuss all of this with your attorney?

THE DEFENDANT: Yes, I have.

THE COURT: And are you satisfied with your attorney and confident in his ability to properly represent you in these proceedings?

THE DEFENDANT: Yes.

THE COURT: I have before me today a guilty plea agreement filed January 7th, 2014, today's date, and this guilty plea agreement has at page nine a signature line for the defendant. Mr. Gonzalez, you are the defendant in this

case. It appears that it was signed January 7th, I believe that was probably 2014.

Is that correct, Mr. Cochran?

MR. COCHRAN: Yes, Your Honor.

THE COURT: Okay. So I'm going to change that date. It was a preprinted form. I will just change it to 2014. Do you have an executed copy or maybe I asked you?

MR. COCHRAN: We do.

THE COURT: Okay. Mr. Gonzalez, your signature on page line, line nine, is that your signature?

THE DEFENDANT: Yes, sir.

THE COURT: Okay.

MR. COCHRAN: Appears you just signed with your last name; is that correct?

THE DEFENDANT: Yes.

THE COURT: But you recognize it as being yours?

THE DEFENDANT: Yes, I do.

THE COURT: Before signing this guilty plea agreement, did you have an opportunity to read it?

THE DEFENDANT: Yes, I did.

THE COURT: Did you have an opportunity to discuss it with your attorney?

THE DEFENDANT: Yes.

THE COURT: Did your attorney give you an opportunity to ask questions about this document?

THE DEFENDANT: Yes.

THE COURT: Did you understand this document? Did you sign this document freely and voluntarily?

THE DEFENDANT: Yes, I did.

THE COURT: Did anyone threaten you or coerce you or force you in any way to sign this document?

THE DEFENDANT: No.

THE COURT: Were there any promises of leniency that were made to you that caused you to sign this agreement, other than what's contained in it?

THE DEFENDANT: No.

THE COURT: You understand that if I accept your guilty plea today, you will be waiving certain constitutional rights?

THE DEFENDANT: Yes, I do.

THE COURT: And these rights are outlined in this guilty plea agreement under the heading waiver of rights, which I believe begins on page seven. Do you have any questions about any of those rights?

THE DEFENDANT: No, sir.

THE COURT: Do you need any additional time to discuss any of this with your attorney before I ask you for your plea?

THE DEFENDANT: No.

THE COURT: I need to ask you, are there any other

collateral consequences associated with this crime to which Mr. Gonzalez apparently intends to plead guilty to, other than that that I've already advised him of?

I guess the question is, is this the type of case where he needs to have any type of evaluation before the Court could consider probation? I failed to do that research before we came in here today.

MR. COCHRAN: I am not aware of that aspect. In general, Your Honor, that seems to be relegated to sexual offenses of that nature in terms of those potential collateral consequences.

In the event, hypothetically, that it did, Your Honor, we would certainly insure that that occurs before his sentence.

THE COURT: Well, none of that appears in the guilty plea agreement. None of those -- those collateral consequences which typically apply in sexual offenses, such as lifetime registration, lifetime supervision, or a need for an evaluation, none of those appear in here. And I didn't look at this particular crime to see if it did require it.

Is the State aware?

MR. HAAS: Your Honor, I am not aware.

MR. COCHRAN: Your Honor, I keep a printout of all the relevant statutes in each case file. And I have 200.575

here, the stalking and aggravated stalking statute, and I don't see anything to that effect.

THE COURT: Okay. Ms. Okuma, are you aware of anything else?

MS. OKUMA: Your Honor, I'm not. But when I go back to my office, I will double check.

THE COURT: Okay. I just want to make sure that in the event there is the need to advise Mr. Gonzalez of any of those collateral consequences that we've taken some time to discuss that here on the record today. It does not appear to be at this time. And if it does become an issue, we may have to -- we may have to return to advise Mr. Gonzalez.

Mr. Gonzalez raised his hand, Mr. Cochran.

I don't know, Mr. Gonzalez, if you should address the Court directly. Why don't you ask your attorney whatever question you may have.

(Whereupon, an off-the-record discussion was had between defense counsel and the defendant.)

MR. COCHRAN: Thank you, Your Honor.

THE COURT: Thank you.

And Mr. Gonzalez, we've had some discussions here about other collateral consequences to your guilty plea. I'm not suggesting that any of those apply. I'm not even suggesting that this is a case -- an offense which falls

into that area of the law.

I just, um -- I just want to make sure that if -- if for any reason it did, that I'm advising you of those consequences.

THE DEFENDANT: Okay.

THE COURT: And the attorneys have indicated to me that they're not aware of this being that type of case. That satisfies the Court. So we'll go ahead and continue. Okay?

THE DEFENDANT: Okay. Thanks.

THE COURT: Do you need any more time to discuss any of this with your attorney?

THE DEFENDANT: No. No, thanks.

THE COURT: Then let's turn back to the information. Count I aggravated stalking, a Category B, felony as set forth in the information filed October 10th, 2013. Mr. Gonzalez, how do you plead?

THE DEFENDANT: Guilty.

THE COURT: As to Count II of that same information, also charging with you aggravated stalking, how do you plead?

THE DEFENDANT: Guilty.

THE COURT: As to Count III of the same information, again, aggravated stalking, how do you plead?

THE DEFENDANT: Guilty.

THE COURT: Are you entering these guilty pleas because in truth and fact you are guilty of these crimes?

THE DEFENDANT: Yes.

THE COURT: I need to insure that there's a factual basis for these pleas. As to Count I, it's indicated in the guilty plea agreement that on or about January 10th, 2013, to January 17, 2013, in Humboldt County, excuse me, State of Nevada, you did knowingly, willfully, and unlawfully and feloniously threaten your estranged wife, Connie Ramirez, by saying that you would slit her throat, the throats of her children and/or her parents and/or made other threats of death to Connie Ramirez and/or her children. Are those facts correct?

THE DEFENDANT: Yes.

THE COURT: That did happen?

THE DEFENDANT: Yes, it did.

THE COURT: As to Count II, for purposes of a factual basis, the guilty plea indicates that on or between January 10th, 2013, and January 17, 2013, in Humboldt County, State of Nevada, you did knowingly, willfully, unlawfully and feloniously threaten Osafae Pallett with death. I may have mispronounced the name, but otherwise are those facts correct?

THE DEFENDANT: Yes.

THE COURT: That did happen?

THE DEFENDANT: Yes.

THE COURT: And as to Count III it indicates, in the guilty plea agreement, that at -- that on or between January 10th, 2013, and January 17th, 2013, in Humboldt County, Nevada, you did knowingly, willfully, and unlawfully and feloniously threaten Richard Pallett with death. Are those facts accurate?

THE DEFENDANT: Yes, sir.

THE COURT: That did happen?

THE DEFENDANT: Yes.

THE COURT: The Court finds that there's a factual basis for Counts I, II and III.

I need to also insure, Mr. Gonzalez, that you have the capacity to enter into this guilty plea agreement. Can you tell me how old you are?

THE DEFENDANT: Forty-three.

THE COURT: And the extent of your education?

THE DEFENDANT: I got my GED.

THE COURT: Do you have any difficulty reading?

THE DEFENDANT: No.

THE COURT: You've been able to read and understand the documents that we've been discussing here in court today?

THE DEFENDANT: Yes.

THE COURT: You're in custody, correct?

THE DEFENDANT: Yes.

THE COURT: And are you, therefore, under the influence of any alcohol?

THE DEFENDANT: No.

THE COURT: Under the influence of any drugs?

THE DEFENDANT: No.

THE COURT: Currently taking any prescription medications?

THE DEFENDANT: Yes, I am.

THE COURT: And what are you taking?

THE DEFENDANT: Seroquel and Trazodone.

THE COURT: And are you taking those according to a prescription issued by a licensed medical provider?

THE DEFENDANT: Yes.

THE COURT: And under the direction of the staff of the Humboldt County Detention Center?

THE DEFENDANT: Yes, sir.

THE COURT: Do you believe that the medications that you're taking would in any way impair your ability to fully understand today's proceedings?

THE DEFENDANT: No.

THE COURT: Have you been able to understand everything that we've done here today?

THE DEFENDANT: Yes.

THE COURT: And you're taking these medications

apparently for some medical condition, correct?

THE DEFENDANT: Yes, sir.

THE COURT: And do you believe that the medical condition that you're taking these medications for would in any way impair your ability to fully understand these proceedings?

THE DEFENDANT: No.

THE COURT: Okay. The Court finds that the defendant has entered his pleas knowingly and voluntarily with a complete understanding of the nature of the offense and the consequences of his plea.

The Court will order a presentence investigation be conducted and report submitted to this Court prior to sentencing.

And absent any other issues to address, we'll set this for sentencing on March 11th, 2014, at 9:00 a.m.

Anything further?

MR. COCHRAN: No, Your Honor.

THE COURT: Thank you. We will be in recess.

(Whereupon, the proceedings concluded.)

STATE OF NEVADA)

) ss.

COUNTY OF HUMBOLDT)

I, ZOIE WILLIAMS, hereby state:

That I transcribed the transcript from a CD(s) of the proceedings entitled herein into typewritten form as herein appears:

That the forgeoing transcript is a full, true, and correct transcription the best of my ability, taking into account the poor quality and inability to hear and decipher said proceedings.

I am certifying that this transcript is a ROUGH DRAFT TRANSCRIPT from a CD of said proceedings, transcribed to the best of my ability, and that this transcript has NOT been EDITED, PROOFREAD, FINALIZED, INDEXED. The hearing(s) was/were held on January 7, 2014;

DATED: This 11th day of June, 2014, Winnemucca, Nevada.

Zoie Williams

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

Case No. CR13-6257

Dept. No. 2

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF HUMBOLDT.

-oOo-

THE STATE OF NEVADA,

Plaintiff,

vs.

MELVIN LEROY GONZALES JR.,

Defendant. /

GUILTY PLEA AGREEMENT

I hereby agree to plead guilty to: 3 COUNTS OF AGGRAVATED STALKING, A Category B Felony, in violation of NRS 200.575(2)(a).

My decision to plead guilty is based upon the plea agreement in this case which is as follows:

Both sides are free to argue at time of sentencing.

The State agrees to recommend that the penalty on each count run concurrent to each other.

1
21

The State explicitly reserves the right to present facts and/or argument through witnesses and/or victims at time of sentencing. Furthermore, the State retains the right to comment on Defendant's crimes, past conduct and/or present evidence in any form.

I understand that if the State of Nevada has agreed to recommend or stipulate to a particular sentence or has agreed not to present argument regarding the sentence, or agreed not to oppose a particular sentence, such agreement is contingent upon my appearance in Court on the initial sentencing date (and any subsequent date if the sentencing is continued). I understand that if I fail to appear for any future scheduled court date in regards to this case or I commit a new criminal offense prior to sentencing, the State of Nevada is released from any agreement as to sentence and would regain the full right to argue for any lawful sentence.

I have entered into these negotiations and have signed this document of my own free will without threat or promise on the part of anyone other than expressed herein.

CONSEQUENCES OF THE PLEA

I understand that by pleading guilty I admit the facts which support all the elements of the offenses to which I now plead. Also, that the State must prove the following elements beyond a reasonable doubt:

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

AS TO COUNT I

1. That on or between January 10, 2013 to January 17, 2013, in Humboldt County, Nevada;

2. I did knowingly, willfully, unlawfully, and feloniously;

3. Threaten my estranged wife, Connie Ramirez, by saying I would "slit her throat, the throats of her children, and/or her parents", and/or made other threats of death to Connie Ramirez and/or her children.

AS TO COUNT II

1. That on or between January 10, 2013 to January 17, 2013, in Humboldt County, Nevada;

2. I did knowingly, willfully, unlawfully, and feloniously;

3. Threaten Osa Pellett with death.

AS TO COUNT III

1. That on or between January 10, 2013 to January 17, 2013, in Humboldt County, Nevada;

2. I did knowingly, willfully, unlawfully, and feloniously;

3. Threaten Richard Pellett with death.

I understand that as a consequence of my plea of guilty I may be imprisoned, on each count, for a minimum term of two (2)

years and a maximum term of fifteen (15) years in the Nevada Department of Corrections. I understand that I may also be fined up to $5000, for each count. I understand that the law requires me to pay an administrative assessment fee of $25 and a $3 DNA assessment fee and a DNA fee in the amount of $150. Furthermore, I understand that pursuant to NRS 176A.100 if I was on probation at the time I committed this offense, probation is not mandatory for any Category E offense to which I plead guilty. I understand that, if appropriate, I will be ordered to make restitution to the victim of the offenses to which I am pleading guilty and to the victim of any related offense which is being dismissed or not prosecuted pursuant to this agreement. I will also be ordered to reimburse the State of Nevada for expenses related to my extradition, if any.

I understand that I am eligible for probation for the offense to which I am pleading guilty. I understand that, except as otherwise provided by statute, the question of whether I receive probation is in the discretion of the sentencing judge.

I understand that there is a collateral consequence of deportation if I am not a citizen of the United States of America, I have been advised that conviction of the offense for which I have been charged may have the consequences of deportation, exclusion from admission to the United States of

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

America, or denial of naturalization pursuant to the laws of the United States of America.

I understand that the District Attorney's Office shall not be bound by any oral negotiations preceding the actual execution of this Agreement until such time as this Agreement has been actually executed, that is, signed, by the District Attorney or one of his authorized deputies and I have entered my plea before the court.

Further, should I, subsequent to the entry of a plea of guilty, as provided for herein, make application for Civil Commitment and/or treatment as an Alcoholic, pursuant to the provisions of NRS 458.290 to NRS 458.350, or if I make a Motion to Suspend or Reduce my sentence pursuant to NRS 453.3363 to NRS 453.3405, the District Attorney shall have the absolute right to withdraw from this Agreement and to proceed against me upon the original charge or charges pending against me, as if this Agreement had never been entered into, or executed by the parties.

I represent to the State that I have _____ prior felonies. The state and county where my prior felonies occurred and type of felony is as follows:

A. _____

B. _____

C. _____

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

Any misrepresentation of my prior criminal record will allow the State to withdraw from this plea agreement.

I understand that if more than one sentence of imprisonment is imposed and I am eligible to serve the sentences concurrently, the sentencing judge has the discretion to order the sentences served concurrently or consecutively.

I understand that information regarding charges not filed, dismissed charges or charges to be dismissed pursuant to this agreement may be considered by the judge at sentencing.

I have not been promised or guaranteed any particular sentence by anyone. I know that my sentence is to be determined by the court within the limits prescribed by statute. I understand that if my attorney or the State of Nevada or both recommend any specific punishment to the court, the court is not obligated to accept the recommendation.

I understand that the Division of Parole and Probation of the Department of Motor Vehicles and Public Safety may or will prepare a report for the sentencing judge before sentencing. This report will include matters relevant to the issue of sentencing, including my criminal history. I understand that this report may contain hearsay information regarding my background and criminal history. My attorney and I will each have the opportunity to comment on the information contained in the report at the time of sentencing.

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

WAIVER OF RIGHTS

By entering my plea of guilty, I understand that I have waived the following rights and privileges:

1. The constitutional privilege against self-incrimination, including the right to refuse to testify at trial, in which event the prosecution would not be allowed to comment to the jury about my refusal to testify.

2. The constitutional right to a speedy and public trial by an impartial jury, free of excessive pretrial publicity prejudicial to the defense, at which trial I would be entitled to the assistance of an attorney, either appointed or retained. At trial, the state would bear the burden of proving beyond a reasonable doubt each element of the offense charged.

3. The constitutional right to confront and cross-examine any witnesses who would testify against me.

4. The constitutional right to subpoena witnesses to testify on my behalf.

5. The constitutional right to testify in my own defense.

6. The right to appeal the conviction, with the assistance of an attorney, either appointed or retained, unless the appeal is based upon reasonable constitutional, jurisdictional or other grounds that challenge the legality of the proceedings and except as otherwise provided in subsection 3 of NRS 174.035. I understand that if I wish to appeal, I must notify my attorney,

in writing, as soon as possible, because the notice of appeal must be filed within thirty (30) days from the judgment of conviction.

VOLUNTARINESS OF PLEA

I have discussed the elements of all the original charges against me with my attorney and I understand the nature of these charges against me.

I understand that the state would have to prove each element of the charge against me at trial.

I have discussed with my attorney any possible defenses and circumstances which might be in my favor.

All of the foregoing elements, consequences, rights and waiver of rights have been thoroughly explained to me by my attorney.

I believe that pleading guilty and accepting this plea bargain is in my best interest and that a trial would be contrary to my best interest.

I am signing this agreement voluntarily, after consultation with my attorney and I am not acting under duress or coercion or by virtue of any promises of leniency, except for those set forth in this agreement.

I am not now under the influence of intoxicating liquor, a controlled substance or other drug which would in any manner

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

impair my ability to comprehend or understand this agreement or the proceedings surrounding my entry of this plea.

My attorney has answered all my questions regarding this guilty plea agreement and its consequences to my satisfaction and I am satisfied with the services provided by my attorney.

DATED this 7 day of JAN., 2014.

Gonzales
DEFENDANT

Furthermore, pursuant to NRS 239B.030., the undersigned hereby affirms this document does not contain the social security number of any person.

Agreed to on this 7th day of

_____, 2014.

DEPUTY DISTRICT ATTORNEY

CERTIFICATE OF COUNSEL

I, the undersigned, as the attorney for the defendant named herein and as an officer of the court hereby certify that:

1. I have fully explained to the defendant the allegations contained in the charges to which guilty pleas are being entered.

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

2. I have advised the defendant of the penalties for each charge and the restitution that the defendant may be ordered to pay.

3. All pleas of guilty offered by the defendant pursuant to this agreement are consistent with all the facts known to me and are made with my advice to the defendant and are in the best interest of the defendant.

4. To the best of my knowledge and belief, the defendant:

(a) Is competent and understands the charges and the consequences of pleading guilty as provided in this agreement.

(b) Executed this agreement and will enter all guilty pleas pursuant hereto voluntarily.

(c) Was not under the influence of intoxicating liquor, a controlled substance or other drug at the time of the execution of this agreement.

DATED this 7th day of May, 2013.

ATTORNEY FOR DEFENDANT

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

Case No. CR 13-6257

Dept. No. 2

FILED

2014 APR 22 PM 3:03

TAMI RAE SPERO
DIST. COURT CLERK

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF HUMBOLDT.

-oOo-

THE STATE OF NEVADA,

Plaintiff,

vs.

JUDGMENT OF CONVICTION

MELVIN LEROY GONZALES JR.
DOB: 04/27/1970

Defendant. /

COUNT I

WHEREAS, on the 7th day of January, 2014, the Defendant entered his plea of guilty to the charge of AGGRAVATED STALKING, a Category B Felony, and the matter having been submitted before the Honorable Judge Michael R. Montero.

COUNT II

WHEREAS, on the 7th day of January, 2014, the Defendant entered his plea of guilty to the charge of AGGRAVATED STALKING, a Category B Felony, and the matter having been submitted before the Honorable Judge Michael R. Montero.

COUNT III

WHEREAS, on the 7th day of January, 2014, the Defendant entered his plea of guilty to the charge of AGGRAVATED STALKING, a Category B Felony, and the matter having been submitted before the Honorable Judge Michael R. Montero.

At the time Defendant entered the plea of guilty, this Court informed the Defendant of the privilege against compulsory self-incrimination, the right to a speedy trial, the right to a trial by jury, the right to compulsory process to compel witnesses to testify on behalf of the Defendant and the right to confront the accusers. That after being so advised, the Defendant stated that these rights were understood and still desired this Court to accept the plea of guilty.

The Court having accepted Defendant's plea of guilty, set the date of the 15th day of April, 2014, at the hour of 9:00 a.m. as the date and time for imposing judgment and sentence.

Furthermore, at the time Defendant entered the plea of guilty and at the time of sentencing, Defendant was represented by attorney, STEVE COCHRAN; also present in Court were TAMI RAE SPERO, Humboldt County Court Clerk or her designated agent; ED KILGORE, Sheriff of Humboldt County or his designated agent; JOHN GRESOCK, representing the Division of Parole and Probation; and KEVIN PASQUALE, Chief Deputy District Attorney representing the State of Nevada.

The Defendant having appeared on April 15, 2014, represented by counsel and Defendant having been given the opportunity to exercise the right of allocution and having shown no legal cause why judgment should not be pronounced at this time. The Defendant pay an administrative assessment fee in the amount of $25.00, a DNA assessment fee in the amount of $3.00, and public defender fee in the amount of $1,500.

The Court further orders the following:

COUNT I

The above-entitled Court having pronounced MEVLIN LEROY GONZALES JR. guilty of AGGRAVATED STALKING, a Category B Felony, in violation of NRS 200.575(2) on the 7th day of January, 2014, the Defendant was thereby ordered by the Court to serve a minimum term of sixty-two (62) months and a maximum term of one hundred fifty-six (156) months in the Nevada Department of Corrections, with a credit for time served of 453 days.

COUNT II

The above-entitled Court having pronounced MEVLIN LEROY GONZALES JR. guilty of AGGRAVATED STALKING, a Category B Felony, in violation of NRS 200.575(2) on the 7th day of January, 2014, the Defendant was thereby ordered by the Court to serve a minimum term of sixty-two (62) months and a maximum term of one hundred fifty-six (156) months in the Nevada Department of Corrections, to run consecutive to the sentence imposed in Count I.

COUNT III

The above-entitled Court having pronounced MEVLIN LEROY GONZALES JR. guilty of AGGRAVATED STALKING, a Category B Felony, in violation of NRS 200.575(2) on the 7th day of January, 2014, the Defendant was thereby ordered by the Court to serve a minimum term of sixty-two (62) months and a maximum term of one hundred fifty-six (156) months in the Nevada Department of Corrections, to run consecutive to the sentences imposed in Counts I and II.

Furthermore, bail, if any, is hereby exonerated.

STEVE COCHRAN represented the Defendant during all stages of the proceedings;

KEVIN PASQUALE, Chief Deputy District Attorney, represented the State of Nevada at all stages of these proceedings.

Therefore, the clerk of the above-entitled Court is hereby directed to enter this Judgment of Conviction as a part of the record in the above-entitled matter.

DATED this 21ST day of April, 2014, in the City of Winnemucca, County of Humboldt, State of Nevada.

DISTRICT JUDGE

SIXTH JUDICIAL DISTRICT COURT
HUMBOLDT COUNTY • LANDER COUNTY • PERSHING COUNTY
MICHAEL R. MONTERO
DISTRICT JUDGE · DEPARTMENT II

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the Humboldt County District Attorney's Office, and that on the 22 day of April, 2014, I delivered at Winnemucca, Nevada, by the following means, a copy of the **JUDGMENT OF CONVICTION** to:

STEVE COCHRAN
Humboldt County Conflict Counsel
c/o Pershing County Public Defender's Office
PO Box 941
Lovelock, NV 89419

(X) U.S. Mail
( ) Certified Mail
( ) Hand-delivered
( ) Placed in box at DCT
( ) Via Fax

Case No. CR-13-6257

Department II

FILED

2014 MAY 28 PM 3:39

TAMI RAE SPERO
DIST COURT CLERK
Deputy

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF HUMBOLDT

ooOoo

THE STATE OF NEVADA,

Plaintiff,

v.

MELVIN LEROY GONZALEZ, JR.,

Defendant.

SENTENCING

TRANSCRIPT OF CD PROCEEDINGS

BE IT REMEMBERED that the above-entitled matter came on for hearing on April 15, 2014, before the HONORABLE MICHAEL R. MONTERO, District Court Judge.

The State was present in court and represented by Kevin Pasquale, Humboldt County Deputy District Attorney.

The Defendant was present in court and represented by Steve Cochran, Humboldt County Conflict Counsel.

The Division of Parole and Probation was present in court and represented by John Gresock.

Transcribed by: Zoie Williams

ORIGINAL

Winnemucca, Nevada, Tuesday, April 15, 2014

oOo

P R O C E E D I N G S

THE COURT: Case number CR-13-6257. Case captioned State of Nevada, plaintiff, vs. Melvin Leroy Gonzalez, defendant.

The record today will reflect the presence of the defendant, Mr. Gonzalez, with counsel Mr. Steve Cochran.

Mr. Kevin Pasquale on behalf of the State.

Sergeant Gresock from Division of Parole and Probation.

This matter is on the Court's calendar today for sentencing.

The record should reflect that Mr. Gonzalez previously pled guilty to three counts of aggravated stalking, Category B felonies, as set forth in the guilty plea agreement filed on January 7th, 2014.

The Court has received a presentence investigation report the prepared by the Division of Parole and Probation. This presentence investigation report is dated February 4th, 2014.

It has a number of attachments. The first is the defendant's statement, which is one page, dated January 16,

2014. There's a victim impact statement, one page, and it's not dated.

And then there's a Lake's Crossing Center, um, report. Actually, reports, multiple pages. And finally, the psychological evaluation by Dr. Nielsen, clinical psychologist, I believe is the final attachment.

The presentence investigation report also indicates credit for time served of 418 days, which indicates through March 11, 2014.

So I'm not certain, Sergeant Gresock, if there needs to be some additional time. I see that Mr. Gonzalez is in custody today. So we'll come back to that.

With that summary, Mr. Cochran, do you have the presentence investigation report? And if so, do you or your client have any corrections?

MR. COCHRAN: None other than the credit for time served issue that the Court just discussed, Your Honor.

THE COURT: Okay. Have you done any type of calculations?

MR. COCHRAN: I believe I have 453 days.

THE COURT: Okay. We will wait for the Division and we will back to that, okay?

Mr. Pasquale, do you have the report? And if so, any factual corrections?

MR. PASQUALE: Your Honor, I have the report and I

don't have any corrections.

THE COURT: Thank you.

Mr. Cochran, any evidence?

MR. COCHRAN: We will be relying on the PSI, as well as the attachments to the PSI, Your Honor.

THE COURT: Thank you.

And Mr. Pasquale, any evidence?

MR. PASQUALE: No evidence to present, Your Honor. I would indicate that there will be victim impact statements.

THE COURT: Okay. Thank you.

And with that, let's proceed with argument, Mr. Cochran.

MR. COCHRAN: Your Honor, where we would like to see the Court go with this today, um, is truly a sentence that I think protects the community, that has a punishment component for Mr. Gonzalez and certainly has a rehabilitation component for Mr. Gonzalez.

I think the evidence throughout this case, Your Honor, definitely shows that we have kind of dual track issues here with some mental illness and definite substance abuse issues.

A very critical distinction I think in this case, Your Honor, is that Mr. Gonzalez, while his actions were certainly inappropriate, wrong, and criminal, this is not a

situation, Your Honor, where he laid a hand on someone or stole from someone.

Um, this is a situation where realistically Mr. Gonzalez was on a bender, essentially, if you will, was extremely intoxicated for a significant period of time and was sending out, um, text message threats to the victim and the family, essentially.

Um, he was not -- he was probably more than a hundred miles away at any point when these threats were communicated. Um, he had, I think, little ability, Your Honor, to effectively do the things that he does not have much, if any, recollection of due to those substance abuse issues that were going on and have been ongoing.

Your Honor, I think that despite, um, what -- there's no way around it, there is a significant criminal history here. Despite that, we do see even recently in 2009, a prior honorable parole discharge. And so we know this is a man who is not completely incapable of following some of the rules going on here.

Your Honor, as indicated, Mr. Gonzalez has never participated in a drug or alcohol treatment program despite there being such a pervasive need. And, you know, there's always two ways of looking at that.

Quite often it gets put upon the person with the medical issue. They should have the initiative to seek that

out. And certainly, in a perfect world that would all happen and we would never have any issues.

But I think realistically when you begin having a poly substance abuse lifestyle at the age of 10, it becomes unrealistic to expect that person to necessarily find the initiative of their own volition and "pull themselves up by their boot straps" and voluntarily address such a significant situation.

Throughout these evaluations, Your Honor, can see numerous diagnosis involving bipolar disorder, adult attention deficit, hyperactive disorder, paranoid schizophrenia, depression, generalized anxiety disorders, that is why I think an order as part of a condition of probation to complete and to apply for and successfully complete a mental health court program that is going to have that dual treatment track with substance abuse as well as mental illnesses are really what's in order here.

He has nearly a year and a half incarceration on this case. So it is not simply a matter of asking the Court to give him an opportunity on supervision. We believe that that near year and a half, with a substantial suspended sentence, Your Honor, um, accurately reflects the seriousness of the crime. That does not take it beyond what actually transpired and that was, essentially, the communication of electronic threats from over a hundred

miles away from the victim.

As indicated, um, in, I believe Dr. Nielsen's psychological review, Your Honor, he indicates that Mr. Gonzalez is not a mean spirited, hostile, or aggressive person when sober. These are some of the diagnostic tools that are used to determine that he's not simply sociopathic. That you truly do have, to quote from the evaluation, that he clearly has mental and emotional problems, you know, of a grave concern. That he is in need of substance abuse treatment within a structured environment.

He's also in need of ongoing psychiatric and psychological treatment for mental illness and emotional disturbance. I think these are, Your Honor, the best ways, in conjunction with this significant stretch of time that he has spent incarcerated to really put an end or at least address really the root cause here.

We see that phrase "root cause" multiple times throughout these attachments. And it really seems that there has not been any addressing of that or even attempted addressing. It seems to me that there's been incarceration. And Mr. Gonzalez acknowledges, you know, things that he has done in the past.

But I think at some point, Your Honor, it becomes time to address the causation here. Certainly, the causation is a mixed bag of mental illness, psychiatric,

psychological issues, and substance abuse, multiple substance abuse.

So with that significant amount of time that he's done, with a significant amount of time held over his head, as well as actual avenues to address these through, you know, the completion of a mental health court where he's going to have that type of monitoring, both of his substance abuse issues, as well as the mental health issues, I think that is what is going to best protect this community immediately, as well as in the future, Your Honor. We'll submit it on that.

THE COURT: Thank you.

Mr. Pasquale.

MR. PASQUALE: Thank you, Your Honor. Your Honor, I think the first thing I heard was these crimes as inappropriate and wrong. How about terrifying, horrifying, terrorizing. If we look at the offense synopsis, that's a more clear picture of how to describe these crimes.

And then we heard he's got an abuse problem. He's got mental health issues. What we didn't hear was that he intends to cure those problems by a crime.

Refer the Court to pages four, five, and six of the PSI. Three pages of criminal records. Six felony convictions. Five prison terms. Nine total incarcerations.

Judge, we've got crimes starting back in 1989 and

continuing to present. We've got crimes in Phoenix, Glendale, Henderson, Boulder City, Phoenix again, Salinas, Phoenix, Las Vegas, Reno. Everywhere he goes, he is a risk to the community.

Your Honor, the only way to deal with this is to incarcerate him. He needs to go back to prison. Five times in prison apparently was not enough for Mr. Gonzalez. Your Honor, I concur with the recommendation contained in the presentence investigation.

THE COURT: Thank you, sir.

Sergeant Gresock.

MR. GRESOCK: Yes, Your Honor. According to the PSI, there were 418 days. There's 20 additional days in March and 15 days in April for a total of 453.

THE COURT: Four fifty-three?

Consistent with Mr. Cochran, your calculation, correct?

MR. COCHRAN: It is, Your Honor.

THE COURT: And Sergeant Gresock, also, I think I noted just another typographical error, bottom of page eight, Count I, just bear with me a minute, Count I, and then you turn the page and it goes to Count I, and then you go to the next paragraph, it says Count I. I believe that would be Count I, Count II, and Count III; is that correct?

MR. GRESOCK: Correct, Your Honor. I noticed that

too.

THE COURT: Okay. So, counsel, I'm going to change that, because it looks like we're sentencing three times on Count I, or the recommendation is for a sentence -- three sentences on Count I.

MR. PASQUALE: Thank you, Your Honor.

THE COURT: Okay.

Thank you, Sergeant Gresock.

Um, Mr. Gonzalez, before I impose sentence on you, you have the right of allocution, which means that you may make a statement to the Court or present information in mitigation of punishment.

At this time, do you wish to make a statement?

THE DEFENDANT: Yes.

THE COURT: You may.

THE DEFENDANT: No matter what happens right now, I just wanted to apologize. I should have never -- I had no reason. You know, these people are nice people. Me and OsaFae don't see eye to eye. But still, no matter what, I had no reason, no business terrifying them like that. I just want to apologize you to guys.

Thanks.

THE COURT: Thank you.

You may seated for a moment.

I understand we may have a victim impact

statement. Mr. Pasquale, is that correct?

MR. PASQUALE: Correct, Your Honor. I anticipate two statements, one from Connie Ramirez and one from OsaFae Pellett.

THE COURT: Mrs. Ramirez, would you like to go first? Mrs. Ramirez, come on, if you will please come up. And, um, Mrs. Ramirez, if you will please stand before the clerk, raise your right hand, and the clerk will administer the oath.

CONNIE RAMIREZ,

Having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

THE COURT: Is that a yes?

THE WITNESS: Yes.

THE COURT: Okay. If you will please take the witness stand here to my left?

Good morning.

THE WITNESS: Good morning.

THE COURT: This is the opportunity for you to provide a victim impact statement. What I would like you to do is first state your full name for the record and spell your last name and then you may proceed.

THE WITNESS: Okay. Connie Ramirez. R-a-m-i-r-e-z.

THE COURT: Thank you.

THE WITNESS: When I met Leroy back in 2008, and shortly after that, about February, 2009, he had moved in with me and he this statement clean and sober. He had been clean and sober for over a year.

And the statement he made to me is, if I'm ever under the influence of drugs or alcohol, you believe what I'm telling you. I said, that sounds kind of scary.

Well, sure enough, in 2010 he threatened to do some things and he did. He destroyed my car. He destroyed an apartment. He did exactly what he said he was gonna do, so I believe him, because he had told me to believe him. He was under the influence at the time that he did those things: Destroying an apartment, a car.

Once again, come 2012 and '13, he starts making these threats against me and my family. So I believed when he said he was going to slice -- he was at my daughter's house and was going to slice her throat and my granddaughter's throat. I believed when he called me and said my parents were dead. But, yeah, I believed his threats. That's all.

THE COURT: Thank you. Hold on just a minute.

Any questions, counsel?

MR. COCHRAN: No, Your Honor.

THE COURT: Thank you. You may step down. Thank

you. And is it OsaFae? Good morning, ma'am. How are you?

First I will have to have you come over here before the clerk, raise your right hand, the clerk will administer the oath.

OSAFAE PELLETT,

Having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

THE WITNESS: So help me God.

THE COURT: Thank you, ma'am. If you will come over here to take the witness stand?

Good morning, ma'am.

THE WITNESS: Good morning.

THE COURT: Can you please state your full name for the record and spell your last name?

THE WITNESS: OsaFae Pellett. P-e-l-l-e-t-t.

THE COURT: Spell the first name for me too, just so --

THE WITNESS: O-s-a-F-a-e.

THE COURT: Thank you, ma'am. You may proceed.

THE WITNESS: Thank you.

Leroy, I'm going to say one thing. I don't think you should be there today and I don't think I should have to be here today.

Um, I'm sorry that your past kept right along with

ya. I have my six children and I know that somebody loves you too.

Um, when you started threatening our lives, I had to take that very seriously, because I don't know you that well.

When you threatened to kill us, slit our throats, when my daughter come home from work, she would find us dead, I had the police come to my house at 3:00 in the morning, because they couldn't get ahold of us because you kept calling and harassing us. I had to take my phone off the hook.

When the police came to the door, Sheriff Walt, I wouldn't answer the door because I thought it was you. Finally, I opened the door a little ways with a gun right by my side. I didn't figure I should have to walk around with a gun or go to my post office or mailbox carrying a gun? I shouldn't have to do that.

I'm close to 80 years old. My life should be really smooth and nice. And then when you threatened my daughter, you wanted to know on the phone if I had found her head -- dead body. And then you threaten my granddaughter and my great granddaughter?

We don't know if you're in Winnemucca or in Reno. You say you're in Reno, looking at my granddaughter's house; a six year old, that was who you were threatening. They had

to close the school down. And my granddaughter and daughter and her husband had to leave their home because they were scared of ya. Nobody should have to be scared of anyone like that.

All I can say is, I wish you could have changed. You had a great opportunity. We did everything we could do for ya. We helped you financially when we could not afford to go pay for some -- for you to live in a motel and to feed you and take care of you. We tried to treat you like one of our own children.

You never learned to say thank you or please. That kind of upset me. Because if somebody was helping me and trying to straighten me out, I would very much appreciate it. And I don't think you've learned that, and I'm sorry for ya.

THE COURT: Thank you, ma'am.

THE WITNESS: Uh-huh.

THE COURT: You may step down.

MR. PASQUALE: Your Honor, if I might? Richard Pellett informed me he would like to make an impact statement.

THE COURT: Okay. Mr. Pellett, if you will please come forward.

Please raise your right hand and face the clerk.

RICHARD PELLETT,

Having been first duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

THE WITNESS: I do.

THE COURT: Thank you, sir. If you will please come take the witness stand?

THE WITNESS: Richard Pellett.

THE COURT: And just for the record, spell the last name.

THE WITNESS: P-e-l-l-e-t-t.

THE COURT: Mr. Pellet, good morning. How are you?

THE WITNESS: Pardon me?

THE COURT: Good morning.

THE WITNESS: Good morning, sir.

THE COURT: You may proceed.

THE WITNESS: The above statements from my daughter and my wife are absolutely true. I want to add the fact that, when you start stalking us through the telephone, uh, your daughter's dead body and so forth, I thought, well, he's drinking, ya know? But it continued to happen.

And I got to thinking, this is something you read about on the 6:00 news. If he would have, if he could have, whatever, ya know?

Point being, the man has not learned how to live

in society. You have all of his records, his past, I don't know how you could do anymore than read down to try make a human being that would live in society. He just -- he just would not fit.

And I really think in the bottom of my mind, after he stalked us, threatened us, I got the 12 gauge out and I put it by the door. I got the 357 out and I put it at the nightstand, because it would have been something -- I won't say would have been. It could have materialized into something. Like I say, you read it in the 6:00 news. I think the man -- I don't think the man will ever fit in society.

THE COURT: Thank you, sir.

Any further victim impact statements?

MR. PASQUALE: No, Your Honor.

THE COURT: Mr. Gonzalez, if you will please stand. Hearing no legal cause why you should not be sentenced, and based upon your pleas of guilty, this Court does now pronounce you guilty to three counts of aggravated stalking, Category B felonies.

In accordance with the laws of the state of Nevada, it is the order and judgment of this Court that the defendant, Melvin Leroy Gonzalez, Jr., be sentenced as follows: As part of the sentence in this case, the Court renders judgment against you in the amount of $25 as an

administrative assessment fee, a $3 DNA collection fee.

Apparently, a biological specimen has previously been provided and, therefore, um, you're not required to submit a biological -- an additional DNA sample or biological specimen in this case.

The Court further renders judgment against you in the amount of $1,500 as a public defender fee.

The Court further orders with regards to Count I, that you are sentenced to confinement in the Nevada Department of Corrections for a minimum term of 62 months to a maximum term of 156 months with credit for time served in the amount of 453 days.

As for Count II, the Court sentences you to a minimum of 62 months and to a maximum of 156 months to run consecutive to the sentence imposed in Count I.

The Court further orders with regards to Count III, that you are sentenced to 62 months -- minimum of 62 to a maximum of 156 months and that sentence will run consecutive to the sentence imposed in Counts I and II.

You will be remanded to the custody of the sheriff to carry out this sentence. We will be in recess.

(Whereupon, the proceedings concluded.)

STATE OF NEVADA)

) ss.

COUNTY OF HUMBOLDT)

I, ZOIE WILLIAMS, hereby state that I transcribed the transcript from a CD(s) of the proceedings entitled herein into a ROUGH DRAFT typewritten form as herein appears:

That the forgeoing transcript is a ROUGH DRAFT transcription the best of my ability, taking into account the poor quality and inability to hear and decipher said proceedings, and that this transcript has NOT been EDITED, PROOFREAD, FINALIZED, INDEXED. The hearing(s) was/were held on April 15, 2014;

DATED: This 28TH day of May, 2014.

Zoie Williams

IN THE SUPREME COURT OF THE STATE OF NEVADA

MELVIN LEROY GONZALEZ,)
Appellant,)
vs.)
)
THE STATE OF NEVADA,)
Respondent.)
_____/

Electronically Filed
Jul 10 2014 11:10 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

No. 65768

FAST TRACK STATEMENT

1. Name of party filing this fast track statement:

Melvin Leroy Gonzalez

2. Name, law firm, address, and telephone number of attorney submitting this fast track statement:

Steven W. Cochran

Pershing County Public Defender

P.O. Box 941

Lovelock, NV 89419

(775) 273-4300

3. Name, law firm, address, and telephone number of appellate counsel if different from trial counsel:

Appellate counsel is the same as trial counsel.

2

Office of the
rshing County
BLIC DEFENDER
lox 941/ 400 Main St
velock, NV 89419

55

4. Judicial district, county, and district court docket number of lower court proceedings:

Sixth Judicial District Court - Humboldt County

Case number: CR 13-6257

5. Name of judge issuing decision, judgment, or order appealed from:

Hon. Judge Michael R. Montero

6. Length of trial. If this action proceeded to trial in the district court, how many days did the trial last?

Not Applicable

7. Conviction(s) appealed from:

Three counts of Aggravated Stalking, Category B felonies, in violation of NRS 200.575(2).

8. Sentence for each count:

With regard to Count I, Mr. Gonzalez was sentenced to a minimum term of sixty-two (62) months and a maximum term of one hundred fifty-six (156) months in the Nevada Department of Corrections, with a credit for time served of 453 days. For Count II, Mr. Gonzalez was sentenced to a minimum term of sixty-two (62) months and a maximum term of one hundred fifty-six (156) months in the Nevada Department of Corrections, to run

Office of the
ershing County
BLIC DEFENDER
lox 941/ 409 Main St
rvelock, NV 89419

consecutive to the sentence imposed in Count I. For Count III, Mr. Gonzalez was ordered to serve a minimum term of sixty-two (62) months and a maximum term of one hundred fifty-six (156) months in the Nevada Department of Corrections, to run consecutive to the sentences imposed in Counts I and II. Bail, if any, was exonerated. An administrative assessment fee in the amount of $25, a DNA assessment fee in the amount of $3 and a public defender fee in the amount of $1,500 is to be paid by the Defendant.

9. Date district court announced decision, sentence, or order appealed from:

April 15, 2014

10. Date of entry of written judgment or order appealed from:
    a. If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

April 22, 2014

11. If this appeal is from an order granting or denying a petition for a writ of habeas corpus, indicate the date written notice of entry of judgment or order was served by the court:
    (a) Specify whether service was by delivery or by mail:

Not Applicable.

Office of the
ershing County
BLIC DEFENDER
Box 941/ 400 Main St
welock, NV 89419

12. If the time for filing the notice of appeal was tolled by a post-judgment motion,

(a) specify the type of motion, and the date of filing of the motion

(b) date of entry of written order resolving motion:

Not Applicable.

13. Date notice of appeal filed:

May 21, 2014

14. Specify statute or rule governing the time limit for filing the notice of appeal,
e.g., N.R.A.P. 4(b), NRS 34.560, NRS 34.575, NRS 177.015, or other:

NRS 177.015

15. Specify statute, rule or other authority, which grants this court jurisdiction to review the judgment or order appealed from:

NRS 177.015 and NRS 174.035.

16. Specify the nature of disposition below, *e.g.*, judgment after bench trial, judgment after jury verdict, judgment upon guilty plea, etc.:

Judgment upon guilty plea.

17. Pending and prior proceedings in this court. List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal (*e.g.*, separate appeals by co-defendants, appeal after post-conviction proceedings):

Supreme Court Case No. 65768

Melvin Leroy Gonzalez vs. The State of Nevada

Office of the
rshing County
BLIC DEFENDER
ox 941/ 400 Main St
velock, NV 89419

18. Pending and prior proceedings in other courts. List the case name, number and court of all pending and prior proceedings in other courts, which are related to this appeal (*e.g.*, habeas corpus proceedings in state or federal court, bifurcated proceedings against co-defendants):

None.

19. Proceedings raising same issues. List the case name and docket number of all appeals or original proceedings presently pending before this court, of which you are aware, which raise the same issues you intend to raise in this appeal:

Supreme Court Case No. 65768

Melvin Leroy Gonzalez vs. The State of Nevada

20. Procedural history. Briefly describe the procedural history of the case (provide citations for every assertion of fact to the appendix, if any, or to the rough draft transcript):

On January 24, 2013, a Felony Complaint was filed alleging Ct. I- Burglary, a category B felony, as defined by NRS 205.060, Ct. II- Receiving, Possessing or Withholding Stolen Property, a category C felony, as defined by NRS 193.130 and NRS 205.275, Count III- Possession of a Controlled Substance, a category E felony, as defined by NRS 453.336 and Count IV- Aggravated Stalking, a category B felony, as defined by NRS 200.575(2)(a). An Amended Felony Complaint was filed adding three additional counts of Aggravated

Office of the
Pershing County
PUBLIC DEFENDER
Box 941/ 400 Main St
Lovelock, NV 89419

Stalking, category B felonies, as defined by NRS 200.575(2)(a). On September 12, 2013, our office was appointed to represent Mr. Gonzalez. On October 4, 2013 an Unconditional Waiver of Preliminary Hearing was filed and this case was bound over to the Sixth Judicial District Court. An Information was filed on October 10, 2013 charging Mr. Gonzalez with three counts of Aggravated Stalking, category B felonies, as defined by NRS 200.575(2)(a). He was formally arraigned on January 7, 2014 and pleaded guilty, pursuant to the guilty plea agreement, also filed on this date. Sentencing was held on April 15, 2014. This direct appeal follows.

21. Issues of First Impression:

Whether or not the multiple convictions of appellant constitute redundant convictions.

Dated this 9th day of July, 2014

Steven Cochran NSB #9949
Pershing County Public Defender
P.O. Box 941 / 400 Main Street
Lovelock, NV 89419
P: (775) 273-4300/ F: (775) 273-4305

ISSUES PRESENTED

Do the multiple convictions of appellant constitute redundant convictions?

I.

STATEMENT OF THE CASE

Appellant pleaded guilty to three counts of aggravated stalking. All three convictions were based on the same course of conduct to his wife and her family. Either the sentences should have been run concurrent, or only one conviction should stand.

II.

LEGAL ARGUMENT

Only one conviction should stand, not three

Review is generally de novo in regards to statutory construction, constitutional issues and redundancy challenges to multiple convictions for an asserted single offense.[1] The Double Jeopardy Clause of the Fifth Amendment

---

[1] Firestone v. State, 120 Nev. 13, 16, 83 P.3d 279, 281 (2004)(whether leaving three victims at the scene of an accident constituted one offense or three presented a statutory question that receives de novo review), Davidson v. State, 124 Nev. 892, 896, 192 P.3d 1185, 1189 (2008)("A claim that a conviction violates the Double Jeopardy Clause generally is subject to de novo review on appeal."). See Ebeling v. State, 120 Nev. 401, 404, 91 P.3d 599, 601 (2004)(receiving de novo a redundancy challenge to multiple convictions for an assertedly single offense).

Office of the
Churchill County
PUBLIC DEFENDER
Box 941/ 400 Main St
Fallon, NV 89419

to the United States Constitution provides that no person shall "be subject for the same offence to twice put in jeopardy of life or limb." This protection applies to Nevada citizens through the Fourteenth Amendment to the United States Constitution.[2] The Double Jeopardy Clause protects against three abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.[3]

NRS 200.575 codifies the crime of stalking in Nevada. Subsection 2 involves aggravated stalking. Subsection 3 involves using various means of electronic messaging. Appellant was convicted of three counts of aggravated stalking pursuant to a guilty plea.

"[A] court should normally presume that a legislature did not intend multiple punishments for the same offense absent a clear expression of legislative intent to the contrary."[4] Criminal statutes must be "strictly construed and resolved in favor of the defendant."[5]

Similar to NRS 484.219 as discussed in Firestone, NRS 200.575 does not

---

[2]Benton v. Maryland, 395 U.S. 784, 794 (1969).
[3]Jackson v. State, Nev. Adv. Op. 55, p. 6 (2012).
[4]Talancon v. State, 102 Nev. 294, 300, 721 P.2d 764, 768 (1986).
[5]Anderson v. State,95 Nev. 625, 639, 600 P.2d 241, 243 (1979); *see also* City Council of Reno v. Reno Newspapers, 105 Nev. 886, 894, 784 P.2d 974, 979 (1989).

Office of the
shing County
BLIC DEFENDER
ox 941/ 400 Main St
velock, NV 89419

62

depend on the number of victims. Specifically, NRS 200.575(6)(a) defines a "course of conduct" as a pattern of conduct which consists of a series of acts over time that evidences a continuity of purpose directed at a specific person."

In the instant matter, that course of conduct was directed towards the defendant's wife's family. His course of conduct caused the family to fear for their lives. This is one violation of the statute, not one for every family member.

When reviewing the district court's canvass of the defendant during arraignment, it becomes easier to see how this was one violation of the statute, not three:

> The Court: Are you entering these guilty pleas because in truth and fact you are guilty of these crimes?
>
> Defendant: Yes
>
> The Court: I need to ensure that there's a factual basis for these pleas. As to Count I, it's indicated in the guilty plea agreement that on or about January 10th, 2013, to January 17, 2013, in Humboldt County, excuse me State of Nevada, you did knowingly, willfully, and unlawfully and feloniously threatened your estranged wife, Connie Ramirez, by saying that you would slit her throat, the throats of her children and/or her parents and/or made other threats of death to Connie Ramirez and/or her children. Are those facts correct?
>
> The Defendant: Yes
>
> The Court: That did happen?
>
> The Defendant: Yes, it did.
>
> The Court: As to Count II, for purposes of a factual basis, the guilty plea indicates that on or between January 10th, 2013, and January 17,

Office of the
rshing County
BLIC DEFENDER
ox 941/ 400 Main St
welock, NV 89419

63

2013, in Humboldt County, State of Nevada, you did knowingly, willfully, unlawfully and feloniously threaten Osafae Pallett with death. I may have mispronounced the name, but otherwise are those facts correct?

The Defendant: Yes

The Court: That did happen?

The Defendant: Yes

The Court: And as to Count III it indicates, in the guilty plea agreement, that at – that on or between January 10th, 2013 and January 17th, 2013, in Humboldt County, Nevada, you did knowingly, willfully, and unlawfully and feloniously threaten Richard Pallett with death. Are those facts accurate?

The Defendant: Yes, sir.

The Court: That did happen?

The Defendant: Yes.

The Court: The Court finds that there's a factual basis for Counts I, II and III.[6]

This case can be viewed as a "unit of prosecution" type of case. Other examples of unit of prosecution cases include Wilson v. State,[7] Ebeling[8] and

---

[6]Rough Draft Transcript, January 7, 2014, continued arraignment, State v. Gonzalez, Case No. CR-13-6257, p.11-12. (See Appellant's Appendix p. 45-46)

[7]121 Nev. 345, 356-57, 114 P.3d 285, 293 (2005)(construing NRS 200.710(2) to authorize one conviction for the use of a minor in a sexual performance, not multiple, per-photograph convictions);

[8]Ebeling, at 404-405 (2004)(NRS 201.220(1) criminalizes the act of exposing oneself and is not a per-witness offense).

Office of the
ershing County
BLIC DEFENDER
lox 941| 400 Main St
rvelock, NV 89419

Bedard v. State.[9] While sometimes using "redundancy" language, these cases recognize that determining the appropriate unit of prosecution presents an issue "of statutory interpretation" and substantive law.[10]

Even if multiple convictions for the same act are permitted under the Blockburger[11] test, redundant convictions will be reversed that do not comport with legislative intent.[12] Convictions are redundant if "the material or significant part of each charge is the same even if the offenses are not the same. Thus, where a defendant is convicted of two offenses that, as charged, punish the identical illegal act, the convictions are redundant."[13] Here, all three convictions arise from and punish the same illegal act, which should result in a finding of redundancy.

---

[9]118 Nev. 410, 414, 48 P.3d 46, 48 (2002)(the Legislature has authorized multiple burglary convictions where several separately leased offices are broken into within a single building).

[10]See Firestone, 120 Nev. at 16, 83 P.3d at 281; accord Sanabria v. United States, 437 U.S. 54, 70 n.24 (1978); Akhil Reed Amar, Double Jeopardy Law Made Simple, 106 Yale L.J. 1807, 1817-18 (1997).

[11]Blockburger v. United States, 284 U.S. 299, 304 (1932).

[12]Salazar v. State, 119 Nev. 224, 227, 70 P.3d 749, 751 (2003)(citing Williams v. State, 118 Nev. 536, 548, 50 P.3d 1116, 1124 (2002).

[13]State of Nevada v. Dist. Ct., 116 Nev. 127, 136 n.7, 994 P.2d 692, 697 n.7 (2000)(noting that the Blockburger "same offense analysis" is distinct from the "redundant convictions analysis" first utilized in Albitre v.State, 103 Nev. 281, 738 P.2d 1307 (1987)).

Office of the
rshing County
BLIC DEFENDER
lox 941/ 400 Main St
welock, NV 89419

The violation was of NRS 200.575(3), not subsection (2)

Subsection 3 of NRS 200.575 indicates that those who commit the crime of stalking by use of text message is guilty of a category C felony, punishable by imprisonment in the state prison for a minimum term of 1 year and a maximum term of not more than 5 years. The crime of aggravated stalking, which is a category B felony, is punishable by 2-15 years. Appellant contends his conviction(s) should only be for the category B felony, because his threats were communicated via text message.

Jurisdiction

Appellant contends his messages were sent from Washoe County. Simply put, the jurisdiction to prosecute the appellant lied with Washoe County, not Humboldt County, where the victim(s) resides.

A challenge to subject matter jurisdiction of a district court is not waivable and "can be raised for the first time on appeal."[14] There is no indication in NRS 200.575 as to whether the situs of the crime is that county from which the threat is sent, or that in which it is received. As previously referenced, criminal statutes are to be construed in favor of the defendant. It has long been held that it is not "incumbent upon the state to prove further than that the offenses was

[14]See Colwell v. State, 118 Nev. 807, 812, 59 P.3d 463, 467 (2002).

Office of the
rshing County
BLIC DEFENDER
ox 941/409 Main St
velock, NV 89419

committed within the county."[15] Nonetheless, it is still required that the offense actually was committed *within* the county.

III.

CONCLUSION

The three convictions and their consecutive sentences constitute redundancy. Jurisdiction was not established in the plea canvass. Additionally, the threats were not communicated in person, but rather, via text message, thereby making the applied subsection of the statute, inapplicable.

Dated this 9th day of July, 2014

Steven Cochran NSB #9949
Pershing County Public Defender
P.O. Box 941 / 400 Main Street
Lovelock, NV 89419
(775) 273-4300 Phone
(775) 273-4305 Fax

[15] State v. Buckaroo Jack, 30 Nev. 325, 334, 96 P. 497, 497 (1908).

VERIFICATION

1. I hereby certify that this fast track statement complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[X] This fast track statement has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in font size 14 Times New Roman; or

[ ] This fast track statement has been prepared in a monospaced typeface using [*state name and version of word-processing program*] with [*state number of characters per inch and name of type style*].

2. I further certify that this fast track statement complies with the page limitations of NRAP 3C(h)(2) because it is either:

[ ] Proportionately spaced, has a typeface of 14 points or more, and contains _____ words; or

[ ] Monospaced, has 10.5 or fewer characters per inch, and contains _____ words or _____ lines of text; or

[X] Does not exceed 14 pages.

3. Finally, I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track statement and that the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track statement, or failing to raise material issues or arguments in the fast track statement, or failing to cooperate fully with appellate counsel during the course of an appeal. I therefore certify that the information provided in this fast track statement is true and complete to the best of my knowledge, information and belief.

DATED this 9th day of July, 2014

Steven Cochran NSB# 9949
Pershing County Public Defender
400 Main Street / P.O. Box 941
Lovelock, NV 89419
(775) 273-4300 Phone
(775) 273-4305 Fax

IN THE SUPREME COURT OF THE STATE OF NEVADA

MELVIN LEROY GONZALES JR.,

Appellant,

v.

STATE OF NEVADA

Respondent.

Docket No. 65768
District Court No. CR13-0257

FAST TRACK RESPONSE

1. Name of party filing this fast track response:

ANTHONY R. GORDON, Humboldt County Deputy District Attorney, Humboldt County District Attorney's Office, P.O. Box 909, Winnemucca, NV 89446

2. Name, law firm, address, and telephone number of attorney submitting this fast track response: Anthony R. Gordon, Humboldt County Deputy District Attorney, Humboldt County District Attorney's Office, P.O. Box 909, Winnemucca, NV 89446

3. Name, law firm, address, and telephone number of appellate counsel if different from trial counsel: same

4. Proceedings raising same issues. List the case name and docket number of all appeals or original proceedings presently pending before this court, of which you are aware, which raise the same issues raised in this appeal: None.

5. Procedural history. Briefly describe the procedural history of the case

only if dissatisfied with the history set forth in the fast track statement: The State adopts Appellant's procedural history

6. Statement of facts. Briefly set forth the facts material to the issues on appeal only if dissatisfied with the statement set forth in the fast track statement (provide citations for every assertion of fact to the appendix, if any, or to the rough draft transcript): The State adopts Appellant's statement of facts, except for legal conclusion contained therein.

7. Issues on appeal. State concisely your response to the principal issue(s) in this appeal:

I. The multiple convictions of appellant for violations of NRS 200.575(2) do not constitute redundant convictions; NRS 200.575(2) was the proper code section charged; and that jurisdiction was proper in Humboldt County, Nevada under NRS 200.581.

8. Legal argument, including authorities:

This court has noted previously that the Legislature, within constitutional limits, is empowered to define crimes and determine punishments, and the courts are not to encroach upon that domain lightly. *Sheriff, Clark County v. Willimas*, 96 Nev. 22, 24, 604 P.2d 800, 801 (1980). In the present case for the crime of stalking under NRS 200.575(1) and NRS 200.575(2), the Legislature has defined a course of conduct under NRS 200.575(6)(a) as a "pattern of conduct which constitute a series of acts over time that evidences a continuity of purpose directed at a *specific*

person." (*Emphasis Added*). The information filed in this case by the State names three specific victims for each of the three violations of NRS 200.575(2) that the Appellant plead guilty to, which are respectively, in Count 1: the Appellant's estranged wife Connie Ramirez; in Count 2: Osafae Pallet; and in Count 3: Richard Pallett. *Appellant's Appendix, Pgs. 12-13.* Appellant asserts here that the three counts of NRS 200.575(2) that he plead guilty to are redundant since they arose from and punish the same act. In the *State of Nevada v. District Court* 16 Nev. 127, 994. P.2nd 692 (2000), this court held that the question [for redundancy] is whether the material or significant part of each charge is the same even if the offenses are not the same. Thus, [this court noted] where a defendant is convicted of two offenses that, as charged, punish the same illegal act, the convictions are redundant *Id.* at 994 P.2d 698. *See also Salazar v. State,* 119 Nev. 224, 70 P.3rd 749 (2003).

The gravemen of the NRS 200.575(2), as clearly specified by the Legislature, is that the perpetrator threatens a "specific person" with the intent to cause that "specific person" to be placed in reasonable fear of death or substantial bodily harm. *See* NRS 200.575 (6)(a) and *Rossana v. State*, 113 Nev. 375, 934 P.2d 1045 (1977). In the present case, there are three distinct "specific persons" that the Appellant intended to place in reasonable fear of death or substantial bodily harm by his actions, thus making each individual threat against the three victims here distinct and separate violations of NRS 200.575(2). If the Legislature intended a "unit of prosecution" reading in the definition of a "course of conduct" in NRS 200.575(6)(a)

as Appellant asserts, it would not have used such narrow language in its legislative scheme by defining stalking acts against specific persons rather than whole groups of individuals.

Second, Appellant was properly charged and pled guilty to the crimes of aggravated stalking in violation of NRS 200.575 (2), a category B felony, instead of the crime of stalking with the use of the Internet in violation of NRS 200.575(3), a category C felony). *Appellant's Appendix, Pg. 44, lines 14-25.* There is nothing in the legislative scheme of NRS 200.575 et. seq. that prevents the state from charging aggravated stalking that involves the use of the Internet under NRS 200.575(2), instead of being limited solely to charging only a violation of NRS 200.575(3) when the Internet is used in the commission of a crime of stalking. The main difference between a stalking violation in NRS 200.575(2), versus a contrasting violation of NRS 200.575(3), is the aggravated nature of the stalking alleged, where the former requires that the perpetrator threaten the victim with the intent to cause them to be placed in reasonable fear of death or substantial bodily harm, notwithstanding the actual method used to commit the crime of stalking. *See Rossana v. State*, 113 Nev. 375, 934 P.2d 1045 (1977). NRS 200.575(3) has no such similar criminal element. In the present case the factual basis for the crimes charged, and which was plead to at the Appellant's arraignment, clearly support three individual violations of NRS 200.575(2) by showing that the Appellant threatened his victims with the intent to cause them to

be placed in reasonable fear of death or substantial bodily harm. *Appellant's Appendix, Pg. 45, lines 4-Pg. 12, line 12.*

Third, NRS 200.581 specifies that the crime of aggravated stalking is deemed to have been committed where the conduct occurred *or where the person affected by the conduct was located at the time that the conduct occurred*, (*emphasis added*). In the present case, the factual basis for the crimes charged and plead to at the Appellant's arraignment, support the jurisdictional basis that the aggravated stalking violations occurred in Humboldt County, Nevada, where the victims resided at the time that Appellant's conduct occurred. *Appellant's Appendix, Pg. 45, lines 4-Pg. 12, line 12.*

Based on the arguments above, the State of Nevada respectfully asks this Court to affirm the sentence imposed in this case.

9. Preservation of issues. State concisely your response to appellant's position concerning the preservation of issues on appeal: Not Applicable

Dated this 30th day of July, 2014.

MICHAEL MACDONALD
Humboldt County District Attorney

By _____
Anthony R. Gordon
Deputy District Attorney
P.O. Box 909
Winnemucca, Nevada 89446
(775) 623-6360

VERIFICATION

1. I hereby certify that this fast track response complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this fast track response has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in size 14 Garamond font.
2. I further certify that this fast track response complies with the page or type volume limitations of NRAP 3C(h)(2) because it is proportionally spaced, has a typeface of 14 points or more, and contains 1386 words.
3. Finally, I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track response and that the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track response, or for failing to cooperate fully with this appellate counsel during the course of an appeal. I therefore certify that the information provided in this fast track response is true and complete to the best of my knowledge, information and belief.

Dated this the 30th day of July, 2014.

MICHAEL MACDONALD
Humboldt County District Attorney

By _____
ANTHONY R. GORDON
Deputy District Attorney
P.O. Box 909
Winnemucca, Nevada 89446
(775) 623-6360

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) I certify that I am an employee of the Humboldt County District Attorney's Office, and that on the 30 day of July, 2014, I mailed/delivered a copy of the FAST TRACK RESPONSE to:

Steve Cochran
Post Office Box 941
Lovelock, Nevada 89419

Attorney General
100 N. Carson Street
Carson City, Nevada 89701

CV 20547

Case No. ~~CR-13-6257~~

Dept. No. 2

FILED

2015 NOV 16 PM 1:16

DISTRICT COURT CLERK

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF HUMBOLDT.

MELVIN LEROY GONZALEZ,
Petitioner,

v.

RENEE BAKER, Warden, ESP,
Respondent.

PETITION FOR WRIT OF HABEAS CORPUS (POSTCONVICTION)

INSTRUCTIONS:

(1) This petition must be legibly handwritten or typewritten, signed by the petitioner and verified.

(2) Additional pages are not permitted except where noted or with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) If you want an attorney appointed, you must complete the Affidavit in Support of Request to Proceed in Forma Pauperis. You must have an authorized officer at the prison complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.

(4) You must name as respondent the person by whom you are confined or restrained. If you are in a specific institution of the Department of Corrections, name the warden or head of the institution. If you're not in a specific institution of the Department but within its custody, name the Director of the Department of Corrections.

(5) You must include all grounds or claims for relief which you may have regarding your conviction or sentence. Failure to raise all grounds in this petition may preclude you from filing future petitions challenging your conviction and sentence.

(6) You must allege specific facts supporting the claims in the petition you file seeking relief from any conviction or sentence. Failure to allege specific facts rather than just conclusions may cause your petition to be dismissed. If your petition contains a claim of ineffective assistance of counsel, that claim will operate to waive the attorney-client privilege for the proceeding in which you claim your counsel was ineffective.

76

(7) When the petition is fully completed, the original and one copy must be filed with the clerk of the state district court for the county in which you were convicted. One copy must be mailed to the respondent, one copy to the Attorney General's Office, and one copy to the district attorney of the county in which you were convicted or to the original prosecutor if you are challenging your original conviction or sentence. Copies must conform in all particulars to the original submitted for filing.

PETITION

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: Ely State Prison, White Pine Co., Nevada by virtue of challenged Judgment of Conviction

2. Name and location of court which entered the judgment of conviction under attack: Sixth Judicial District Court of Nevada/Humboldt County, Dept. 2 Winnemucca, Nevada

3. Date of judgment of conviction: 22nd APRIL, 2014

4. Case number: CR13-0257

5. (a) Length of sentence: 62 TO 156 months CT I } ALL
62 TO 156 months CT II } CONSECUTIVE
62 TO 156 months CT III } TO EACH OTHER

(b) If sentence is death, state any date upon which execution is scheduled: N/A

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion? Yes _____ No X

If "yes", list crime, case number and sentence being served at this time: N/A

7. Nature of offense involved in conviction being challenged: 3 counts AGGRAVATED STALKING

8. What was your plea? (check one):

(a) Not guilty _____ (b) Guilty X (c) Nolo contendere _____

9. If you entered a plea of guilty to one count of an indictment or information, and a plea of not guilty to another count of an indictment or information, or if a plea of guilty was negotiated, give details:

N/A

10. If you were found guilty after a plea of not guilty, was the finding made by: (check one)

(a) Jury _____ (b) Judge without a jury _____ N/A

11. Did you testify at the trial? Yes _____ No _____ N/A

12. Did you appeal form the judgment of conviction? Yes X No _____

13. If you did appeal, answer the following: 5/21/14

(a) Name of Court: NV Supreme Court

(b) Case number or citation: 65768

(c) Result: Affirmed

(d) Date of result: 11/12/14 Remittitur 12/12/14
(Attach copy of order or decision, if available.)

14. If you did not appeal, explain briefly why you did not: N/A

15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal?
Yes ____ No X

16. If your answer to No. 15 was "yes", give the following information:
(a)(1) Name of court: N/A
(2) Nature of proceeding:
(3) Grounds raised:
(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ____ No ____
(5) Result:
(6) Date of result:
(7) If known, citations of any written opinion or date of orders entered pursuant to such result:

(b) As to any second petition, application or motion, give the same information:
(1) Name of court:
(2) Nature of proceeding:
(3) Grounds raised: N/A
(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ____ No ____
(5) Result:
(6) Date of result:
(7) If known, citations of any written opinion or date of orders entered pursuant to such a result:

(c) As to any third or subsequent additional applications or motions, give the same Information as above, list them on a separate sheet and attach.

(d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any petition, application or motion?
(1) First petition, application or motion? Yes ____ No ____
Citation or date of decision:
(2) Second petition, application or motion? Yes ____ No ____
Citation or date of decision:
(3) Third or subsequent petitions, applications or motions? Yes ____ No ____
Citation or date of decision:

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) N/A

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion, application or any other postconviction proceeding? If so, identify: NO

(a) Which of the grounds is the same: N/A

(b) The proceedings in which these grounds were raised: N/A

(c) Briefly explain why you are again raising these grounds. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) N/A

18. If any of the grounds listed in No.'s 23(a), (b), (c) and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) Ineffective Counsel on Direct Appeal

19. Are you filing this petition more than one year following the filing of the judgment of conviction or the filing of a decision on direct appeal? If so, state briefly the reasons for the delay. (You must relate specific facts in response to this question. Your response may be included on paper which is 8 ½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.) No Remittitur Filed 12/22/15

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes ____ No X

If yes, state what court and case number: N/A

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal: Steve Cochran, Esq

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack? Yes ____ No X

If yes, specify where and when it is to be served, if you know: N/A

23. State concisely every ground on which you claim that you are being held unlawfully. summarize briefly the facts supporting each ground. If necessary you may attach pages stating additional grounds and facts supporting same.

(a) **Ground One**: See Attached

Supporting **FACTS** (Tell your story briefly without citing cases or law.):

(b) **Ground Two**: See Attached

Supporting **FACTS** (Tell your story briefly without citing cases or law.):

(c) **Ground Three**: See Attached

Supporting **FACTS** (Tell your story briefly without citing cases or law.):

(d) **Ground Four**: See Attached

Supporting **FACTS** (Tell your story briefly without citing cases or law.):

WHEREFORE, petitioner prays that the court grant petitioner relief to which he may be entitled in this proceeding.

EXECUTED at Ely State Prison, on the 5th day of the month of November, of the year 2015.

X Melvin L Gonzales
Signature of petitioner
Melvin Gonzales
Ely State Prison
Post Office Box 1989
Ely, Nevada 89301-1989

N/A
Signature of Attorney (if any)

Attorney for petitioner

Address

VERIFICATION

Under penalty of perjury, the undersigned declares that he is the petitioner named in the foregoing petition and knows the contents thereof; that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and as to such matters he believes them to be true.

X Melvin L. Gonzales
Petitioner
Melvin Gonzales

N/A
Attorney for petitioner

CERTIFICATE OF SERVICE BY MAIL

I, Melvin Gonzalez, hereby certify pursuant to N.R.C.P. 5(b), that on this 5th day of the month of November, of the year 2015 I mailed a true and correct copy of the foregoing **PETITION FOR WRIT OF HABEAS CORPUS** addressed to:

Respondent prison or jail official

Address

Attorney General
Heroes' Memorial Building
100 North Carson Street
Carson City, Nevada 89710-4717
For Warden Renée Baker

Humboldt Co. District Atty
District Attorney of County of Conviction

PO Box 909
Winnemucca, NV 89446
Address

Melvin L. Gonzalez
Signature of Petitioner
Melvin Gonzalez

MEMORANDUM OF GROUNDS, POINTS, and AUTHORITIES

GROUND 1

PETITIONER'S FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS, TO BE INFORMED OF THE NATURE AND CAUSE OF THE ACCUSATION, TO CONFRONT THE WITNESSES AGAINST THEM, AND TO A FAIR TRIAL AND THE EFFECTIVE ASSISTANCE OF COUNSEL WERE VIOLATED BY THE CUMULATIVE ERRORS OF COUNSEL...

The standard for ineffective assistance of counsel under the US Constitution is the same no matter where you are. There are three ways the Petitioner can make an ineffective counsel claim, and Petitioner would allege that all three are found within the case: (1) The lawyer was actually ineffective; (2) constructively ineffective; or, (3) that there was a conflict of interest that caused him to be actually ineffective. Each of these claims, though the Petitioner claims all of them, requires the Petitioner to show different things.

(a) Actual Ineffectiveness

In general, to show ineffectiveness of counsel under the US Constitution, the Petitioner must pass the two-prong "STRICKLAND TEST." See, STRICKLAND v. WASHINGTON, 466 US 668, 687, 104 S Ct 2052, 2064 (1984) (establishing the federal standard for ineffective counsel); see also, KNOWLES v. MIRZAYANCE, 129 S.Ct 1411, 1420 (2009). The First part of the test, the "deficient performance prong," requires the Petitioner to prove the lawyer's performance was deficient. The Court is to decide whether the lawyer acted in a way that most other lawyers would think is acceptable. This standard can apply differently in different cases, and thus, Petitioner, in this ground lists all the cumulative errors of counsel to demonstrate the actions/inaction by this individual to effectively deny counsel.

IF the Court finds the lawyer's representation fell below the objective standard of reasonableness, it will apply the second part of the "STRICKLAND TEST." The second part, the

"prejudice prong," requires the Petitioner to prove there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." This means the Petitioner need not only have to point out what the lawyers did wrong, but he must also show that the lawyer's actions hurt him and possibly changed the outcome of the trial. The Petitioner can only win an ineffective counsel claim in this manner if both parts of the test are met. However, the Court must be cautioned that the US Supreme Court has specifically ruled that the "prejudice prong" requires the Petitioner to show only a "reasonable probability" of a different result, and he does not have to prove that his lawyer's errors "more likely than not altered the outcome."

The Petitioner, here, does not only seek this Court review the errors of counsel in solely an individual light, but in a cumulative one as well. See, e.g., MACKEY v. RUSSELL, No 02-4237, 148 Fed. Appx 355, 369 (6th Cir, Aug. 9th, 2005) (unpublished) (holding state court unreasonably applied STRICKLAND when it failed to consider to cumulative effect of counsel's errors).

(b) Constructive Ineffectiveness

The next type of ineffective counsel claim that the Petitioner asserts, as available to him under the US Constitution is a "constructive denial" of the assistance of counsel as described in US v. CRONIC, 466 US 648, 658, 104 S. Ct 2039, 2046 (1984) (recognizing a right when performance of counsel deprived a defendant of a fair trial). The Petitioner can claim constructive ineffective assistance if the circumstances of a proceeding were so unfair that prejudice and ineffective assistance if the circumstances of a proceeding were so unfair that prejudice and ineffective assistance can be presumed. Therefore, under the CRONIC standard, it does not have to be proven that there was actual prejudice.

The CRONIC standard applies in three situations. First, prejudice

may be presumed if Petitioner was completely denied counsel during a "critical stage" of his trial. See, RICKMAN v. BELL, 131 F.3d 1150, 1156-1160 (6th Cir, 1997) (affirming judgment of ineffective assistance where counsel had abandoned defendant's interests by repeatedly expressing contempt for client at trial and portraying client as dangerous and crazy, effectively acting as a second prosecutor); also; JAVOR v. US, 724 F.2d 831, 833-34 (9th Cir, 1994), 724 F.2d 831, 833-34 (9th Cir, 1994) (finding prejudice inherent when counsel slept through much of the trial). Second, Petitioner can also make a CRONIC claim if his lawyer "entirely failed to subject the prosecutors case to meaniful adversarial testing." The lawyer's failure to test the State's case must have been complete, meaning the attorney put up no opposition whatsoever. Third, the Petitioner can also make a CRONIC claim if the circumstances of his trial made it highly unlikely that the lawyer could have provided effective assistance. If his case is determined to fall within the third situation, he does not have to prove deficient performance by the lawyer.

(c) Conflict of Interest

The third type of ineffective counsel claim that Petitioner alleges argues that conflict provided ineffective assistance due to conflict of interest. To show that counsel had a conflict of interest, Petitioner must demonstrate that there was an actual conflict of interest that "adversely affected the lawyer's performance. This test is derived from COYLER v. SULLIVAN, 446 US 335, 350, 100 S. Ct 1708, 1719 (1980). The conflict must have been actual, not potential, which means that the lawyer must have taken some action, or refrained from acting in some way, which harmed Petitioner and benefitted another person. The Petitioner is not required to show prejudice if his lawyers had an actual conflict of interest that adversely affected him, because prejudice is presumed.

Under NV S. Ct Rule 15-7, "A lawyer shall not represent a client, if the representation of that client may be materially limited by the lawyer's responsibilities to another client... or to themselves... unless:..., (b) the client consents in writing." Because Petitioner faced serious

charges, for which the maximum potential penalty, by and large, consumes the remainder of his life, any violation of this rule would have been a clear prejudice to Petitioner. Petitioner also directs the State to view Clark v. STATE, 831 P.2d 1374 (Nev, 1992), where the Court determined that every defendant has a Constitutional Right to assistance of counsel that is unhindered by conflicting interests, as will be shown herein.

Furthermore, HARVEY v. STATE, 619 P.2d 1219 (Nev, 1980) shows us that conflicts of interests and divided loyalty situations can take many forms, and whether actual conflict exists must be evaluated for the specific facts of each case. For example, in SEWELL v. MAYNARD, 383 S.E. 2nd 536 (1989, W.VA), the Court pointed out that "economic pressure must adversely affect the manner in which at least some cases are conducted," by criminal defense lawyers who receive only a nominal fee for their services. Additionally, the Florida Court of Appeals observed:

> "[I]t would be foolish to ignore the very real possibility that a lawyer may not be capable of properly balancing the obligation to expend the proper amount of time in an appointed criminal matter, where the fees involved are nominal, with his personal concerns to earn a decent living by devoting his time to matters wherein he will be reasonably compensated." See, OKEECHOBEE v. JENNINGS, 473 So 2nd 1314 (FL Dist Ct Appls, 1985).

The US Supreme Court ruled in CUYLER, supra., that: "In order to find a Sixth Amendment violation based on a conflict of interest, the reviewing court must find (1) that counsel actively represented conflicting interests, and, that, (2) an actual conflict of interest adversely affected the attorney's performance. Id., at 348, 100 S.Ct 1718 Under CUYLER, the Court must presume prejudice if the conflict of interest adversely affected the lawyer's performance. Id.; Although CUYLER involved a conflict of interest between clients, the presumption of prejudice extends to a "conflict between a client and his lawyer's personal interests" See also, MANNHALT v. REED, 847 F.2d 576, 580 (9th Cir, 1988), cert. den'd, 488 US 908, 109 S Ct 260 (1988).

The review of a district Court's order denying a motion to substitute counsel, or similar motion, is based upon an abuse of discretion. US v. REEVEY, 364 F.3d 151, 156 (4th Cir, 2004). In reviewing the trial court's exercise of discretion on the conflict between counsel and his client, the Court must consider three (3) factors: (1) timeliness of the motion; (2) the adequacy of the Court's ~~Motion~~ inquiry (sic.), and, (3) whether the conflict is so great that it resulted in a total lack

of communication, preventing an adequate defense. US v. Mussa, 320 F.3d 1096, 1102 (9th Cir, 2000).

The Court must conduct such necessary inquiry as might ease the defendant's dissatisfaction, distrust, and concern. The inquiry must also provide a sufficient basis for reaching an informed decision. The Court must look at the depth of the conflict, the extent of any breakdown in communications, and issues of delay at trial. US v. ADELZO-GONZALEZ, 268 F.3d 772, 777 (9th Cir, 2001). The Court should not ask open-ended questions, and should specifically inquire into the nature of the dispute, to determine if there is an antagonistic relationship, lacking in trust.

At a hearing, the Court would have been required to question the attorney and client privately, and in depth. US v. NGUYEN, 262 F3d 998, 1004 (9th Cir, 2000). An evidentiary hearing is the appropriate forum to decide whether counsel should have been substituted. SCHELL v. WITEK, 218 F.3d 1017, 1027 (9th Cir, 2000). In SCHELL, the Court held that an appropriate remedy was to conduct an evidentiary hearing. If a motion is improperly denied, the trial should be presumed to be unfair and no showing of prejudice need be made. Id, at 1027.

Petitioner herein alleges that counsel was unwilling to represent and/or assist him. Petitioner would allege that counsel's actions and inactions prejudiced him, resulting in unfair proceedings. Whether the errors are taken individually, Petitioner alleges that counsel prejudiced him, and that prejudice could be presumed and need not be proven.

While any single error itself might not result in ineffective assistance, the cumulative error doctrine recognizes that the cumulative effect of several errors may prejudice a defendant to the extent that his conviction must be overturned. US v. FREDERICK, 78 F.3d 1370, 1381 (9th Cir, 1996); US v. WALLACE, 848 F.2d 1464, 1476 (9th Cir, 1988).

Counsel failed to conduct any adequate pre-trial investigation in this case. In WIGGINS v. SMITH, 539 US 510, 524 (2003), a habeas claim was granted because counsel's performance was so poor as to amount to ineffective assistance, solely because counsel failed to conduct pretrial investigation. LORD v. STATE, 184 F.3d 1083 (9th Cir, 1999) held that counsel's failure to investigate evidence, which demonstrated innocence or mitigation, undermines the confidence in the outcome, and constitutes ineffective assistance of counsel.

In CRANDALL v. BUNNELL, 144 F 3d 1213 (9th Cir, 1988), that Court also held that defense counsel's failure to confer with the defendant, to seek discovery, to investigate the crime charged or interview witnesses, to develop a working relationship with the defendant, amounted to incompetent representation and should have required substitution of counsel. See also, HARRIS by and through RAMSEYER v. WOOD, 64 F 3d 1432 (9th Cir, 1995); BAUMANN v. US, 692 F.2d 565 (9th Cir, 1982); and, US v. TUCKER, 716 F.2d 576 (9th Cir, 1983). All of these cases prove a deficiency on the part of counsel, and show that their performance or lack thereof prejudiced Petitioner, particularly in light of counsel waiving the probable cause hearing, not seeking adequate discovery, and failure to investigate and interview witnesses.

Under STRICKLAND, the Court must decide whether the attorney's performance "Fell below an objective standard of reasonableness." As stated in STRICKLAND, these duties include basic professional standards, such as (but are not all-inclusive of) a duty of loyalty, a duty to avoid conflicts of interest, a duty to advocate the defendant's cause, a duty to consult with defendant on important developments during the prosecution, and a duty to use the level of skill and knowledge to make the proceedings truly adversarial.

MACKEY v. RUSSELL, supra, held that a state Court unreasonably applied STRICKLAND when it failed to consider the cumulative effect of counsel's errors. Further, US v. CRONIC, supra, held that if counsel was completely denied - actually or constructively - (which occurs where counsel abandons clients interests) or if counsel fails to subject the prosecution's case to adversarial testing, a petitioner shall not be required to show prejudice, but that prejudice is and shall be presumed. The errors, whether reviewed individually or cumulatively, showed that the counsel appointed to represent the Petitioner had no interest in representing him or performing the duties ascribed to him. See, STATE v. GONZALEZ, 393 N.E.2d 987 (N.Y, 1979) Additionally, any error of counsel that can/may increase Petitioner's sentence (including such errors as cause Petitioner to be bound over on more severe charges than appropriate) is prejudicial For the purposes of an ineffective assistance of counsel claim. See, US v. PALOMBA, 31 F.3d 1456.

In viewing STATE v. STOKES, 304 S.E.2d 184 (1984), it can be seen that because Petitioner was an indigent defendant, that he was entitled, as part and parcel of the Sixth Amendment right to counsel, to be furnished expert witnesses, including investigators, at state ex

The defendant need show that there is reasonable likelihood that he will be materially assisted in preparation of his defense, or that without expert services, he will probably not receive a fair trial or penalty hearing. As Petitioner was given a competency hearing by the Court, it was clear that the Court determined that his mental health was at issue. To allow defendant to take a plea while on psychotropic medications, or without determining his state of mind at the time of the offenses for determing mitigation of guilt or punishment. Where the services of these experts were inadequate or not provided, Petitioner was subjected to ineffective assistance of counsel in [redacted] (mig) preparing a defense. See, WARNER v. STATE, 729 P.2d 1359 (Nev, 1986); AKE v. OKLAHOMA, 420 US 68 (1985); and COX v. STATE, 805 P 2d 374 (Alaska App., 1991)

Petitioner first contends that his Rights to "effective and substantial assistance" of counsel were violated at a critical stage of the criminal proceedings. See, SCHNECKLOTH v BUSTAMONTE, 93 S.Ct 2041 (1973) In various cases, the US S.Ct has held that a preliminary hearing is a critical stage of the criminal proceedings at which a defendant is guaranteed the right to effective assistance of counsel. See, HAMILTON v ALABAMA, 82 S Ct 157 (1961); WHITE v MARYLAND, 83 S.Ct. 1050 (1963); MASSIAH v. US, 84 S.Ct 1199 (1964); and COLEMAN v. ALABAMA, 90 S. Ct 1999 (1970).

(a) ATTORNEY COCHRAN'S DECISION TO WAIVE THE PRELIMINARY EXAMINATION

ATtorney Cochran lied to Defendant, in the very minimal contact he had with him, and convinced defendant that the District ATtorney had filed the "Large Habitual Criminal" statute on defendant, and that if he didn't enter a guilty plea and waive his preliminary hearing, he would serve "Life without" in state prison. Additionally, the ATtorney stated that the defendant-petitioner would be promised that ~~[redacted]~~ the three charged would be run concurrent and the minimum sentence recommended if he agreed to treatment. ATtorney Cochran should have known that Petitioner had a competency evaluation and was on powerful psychotropic medications that severely affected his judgment. Petitioner had no idea what was happening with his case, and he trusted the lawyer that was appointed to represent him, despite only seeing him a scant few minutes. It can only be surmised that ATtorney Cochran lied and coerced Petitioner to waive his preliminary and take a

plea.

In determining whether the waiver of the preliminary examination was prejudicial, we must establish the intent and purpose of the preliminary examination, and its role in the criminal process. In doing so, the Petitioner would direct the Court's attention to PEOPLE ex REL LEIDNER v. COLORADO, 597 P 2d 1040 (1979, Colo), where reference to the historical foundation of the modern preliminary hearing illustrates a primary purpose of ferreting out unwarranted or improvident prosecutions. To further elaborate, the protection afforded the accused by the examination is the RIGHT not to be imprisoned and held to answer at trial under a malicious or unwarranted prosecution, especially where defense counsel lies to defendant and effectively acts as a second prosecutor. See, COMMONWEALTH v. O'BRIEN, 124 A-2d 666 (1956, Penna.); and, see also, RICKMAN v. BELL, supra.

(b) COCHRAN'S FAILURE TO REQUEST PERMISSION OF THE COURT TO RETAIN CERTAIN EXPERT WITNESSES

Cochran Knew Petitioner had previously had a competency examination per court order. This is part of the Court Minutes of the case. If Cochran said he was not aware of this fact, it would show he did not even review case history. Cochran barely spent any time with Petitioner, but in the little time he spent with him he would have to be able to tell that Petitioner was not clearly lucid, due to his psychotropic medications. Cochran should have requested a new evaluation to determine both the competency on psychotropics to accept a plea and waive a hearing, and to determine mens rea at the time of the crime and potential for rehabilitation in mitigation for sentencing.

As stated above, we saw from STOKES, supra., that and indigent defendant is entitled to expert services. The Nevada Supreme Court, in ALFORD v. STATE, 906 P.2d 714 (1995) has made the determination, that given good cause, a criminal defendant has a RIGHT to psychiatric examination to determine his intent at the time of the (alleged) crime. Petitioner asserts that he was suffering under a psychiatric condition that was untreated at the time of the crime, worsened by use of illegal drugs. Petitioner asserts that an expert could have testified (HELD) to this fact and the potential for rehabilitation, to be used in mitigation in this case. Given these circumstances, Petitioner should have had a right to pretrial psychiatric exam for the purposes of determining requisite intent and potential for

rehabilitation.

(c) COCHRAN'S FAILURE TO INTERVIEW WITNESSES

Cochran interviewed no witnesses. In fact, he filed no Motion For Discovery to determine whether interviewing of witnesses would have been a strategic decision, before determining to coax Petitioner into a plea. Petitioner would like to note that he requested the attorney interview witnesses in the case. Petitioner would again direct the Courts attention to WARNER v. STATE, supra, where it was determine that counsel was ineffective in failing to interview witnesses, given demands of the Defendant.

(d) COCHRAN'S THREATENINGLY INDUCING PETITIONER INTO PLEA AGREEMENT.

Petitioner was prejudiced by the lies of counsel that convinced him to take the guilty plea by threatening that the District Attorney had (not) charged him with the Large Habitual Criminal Statute and he would spend the rest of his life in prison. He also threatened that, if Petitioner didn't take the plea he would be given consecutive sentences, but if he accepted the plea, all sentences would be concurrent and the habitual criminal statute would be dropped. Petitioner did not learn until his appeal that the the habitual criminal statute had never been charged. (see, STORRICK v. STATE, 604 P. 2d 341 (1979), where Petitioner felt he had no other choice, when presented with a now-or-never plea agreement on counsel's threat, to avoid imprisonment for the rest of his natural life)

(e) COCHRAN'S FAILURE/REFUSAL TO FILE A MOTION TO WITHDRAW GUILTY PLEA

When Petitioner was sentenced, he learned that he had been lied to by his lawyer about the consequences of his plea, i.e., the manner in which he would be sentenced. When presented with the written plea agreement Petitioner told Cochran he could not read the agreement while on the psychotropic medications, and counsel skimmed the agreement, claiming to be explaining the contents to Petitioner. However, Petitioner was told the agreement stated the same as what counsel said he was offered when counsel threatened with the plea agreement. Counsel

never provided Petitioner in order for him to see he had been lied to. This was unknown to him until he did not receive the sentence and treatment recommendation that he was told he was to receive as part of the agreement. Petitioner immediately instructed Cochran to withdraw his plea and Cochran said he would not attempt to do so.

The Petitioner accepted a guilty plea only on the advice/threat of counsel, and therefore the plea was not voluntary, (See STURROCK v. STATE, 604 P.2d 341 (Nev, 1979)), as Petitioner considered the cumulative nature of the errors of counsel (even if the errors may have been harmless individually - See BYFORD v. STATE, 994 P.2d 700 (Nev, 2000)), and counsel's inadequacy in trial preparation, in deciding not to go to trial. Petitioner wished to go to trial on the merits, but feared the results, due to the representation by counsel whose interest was clearly not in representing Petitioner. See, STATE v. GOMES, 930 P 2d 701 (Nev 1996); STATE v. LANGARICA, 822 P.2d 1110 (1991, Nev); and PEOPLE v. GONZALEZ, 393 NE 2d 987 (NY, 1979). Further, any error of counsel that may increase a Petitioner's sentence is prejudicial for the purpose of an ineffective assistance of counsel claim. See, USCA Const. Amend 6, US v PALOMBA, 31 F.3d 1456.

GROUND 2

PETITIONER'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS WERE VIOLATED UNDER THE 5TH, 6TH, AND 14TH AMENDMENTS TO THE US CONSTITUTION AND ARTICLE 1, SECTIONS 8 AND 10 OF THE CONTITUTION OF THE STATE OF NEVADA WERE VIOLATED WHERE THE PETITIONER ASSERTS THAT HE HAS BEEN DEPRIVED OF LIFE AND LIBERTY, WITHOUT ADEQUATE DUE PROCESS OF LAW, BASED UPON THE PREMISE THAT PETITIONER WAS UNAWARE AS TO THE TRUE NATURE AND CONSEQUENCES OF HIS PLEA, WHERE PETITIONER WAS IN A STATE OF MENTAL INSTABILITY, CAUSED BY INTOXICATION DUE TO A FORCED AND VOLATILE MIXTURE OF PSYCHOTROPIC MEDICATIONS WHICH RESULTED IN SERIOUSLY IMPAIRED JUDGEMENT, COHERENCY, AND ABILITY TO CONCENTRATE, AS WELL AS EXTREME ANXIETY AND EMOTIONAL DISTURBANCE.

Petitioner contends that his plea was not knowing and voluntary, because he was not receiving properly monitored psychiatric care at the Humbolt Co Detention Center. The Detention Facility main-

tained the medication regimen that Petitioner was placed on at the time of his competency hearing, but he was returned to the detention center before having been stabilized on the medications, he was prescribed a regimen of Trazadone and Seraquel, both of which are sedatives and can have contraindicated effects with one another.

At the time of Petitioner's plea, he was not coherent as to the severity of the circumstances surrounding the plea. He was unable to make snap judgments or to understand the gravity of the offer. He knew he was supposed to trust his attorney, and his attorney made representations and promises that were not representative of the true nature of the proceedings. Petitioner was unable to ascertain this while on the cocktail of medications that was being foisted upon him, when there was not a regular psychiatrist to monitor and stabilize him.

Petitioners use of prescribed regimens of psychotropics rendered Petitioner's judgment so impaired as to make his guilty plea unknowing and involuntary. Further, under RIGGINS v. NEVADA, 504 US 127 (1992), it was ruled that forced use of antipsychotics while in the course of criminal proceedings is unconstitutional, and since Petitioner was forced to use a volatile mixture of psychotropics, his dueprocess rights were violated in that respect. A plea is unknowing and involuntary where the defendant lacked the mental capacity to plead. MATUSIAK v. KELLY, 786 F.2d 536 (2d Cir 1986). A case should be remanded for evidentiary hearing to resolve whether a guilty plea was involuntary due to the defendant's drug use. (mlc) US v. GUTIERREZ, 839 F. 2d 618 (10th Cir, 1988).

GROUND 3

DUE PROCESS VIOLATED WHERE CRUEL AND UNUSUAL PUNISHMENT INFLICTED DURING SENTENCING PROCEDURE

PETITIONER'S 5th, 6th, 8th AND 14th AMENDMENTS TO THE US CONSTITUTION, AND HIS RIGHTS UNDER ARTICLE I, SECTIONS 6, 8, AND 10

OF THE CONSTITUTION OF THE STATE OF NEVADA, WERE VIOLATED WHERE PETITIONER WAS SENTENCED OUTSIDE OF THE PROMISED GUIDELINES OF MINIMUM CONCURRENT SENTENCES TO ALLOW FOR PETITIONER'S TREATMENT AND REHABILITATION, RESULTING IN A VIOLATION OF DUE PROCESS AND A CRUEL AND UNUSUAL SENTENCE RECEIVED IN RESPONSE TO AN ILLEGALLY INDUCED PLEA WHILE PETITIONER WAS IN A STATE OF MENTAL INSTABILITY.

Petitioner asserts that counsel and the prosecutor took advantage of Petitioner's mental instability due to involuntary intoxication caused by psychotropic medications. They used this to force waiver of preliminary examination and acceptance of a guilty plea, based in large part of the inducement of concurrent minimum sentences to allow for drug and alcohol and mental health rehabilitation and treatment. However, though Petitioner's crimes were all part of one common transaction, while Petitioner's mental state was untreated and he was voluntarily intoxicated on alcohol and drugs.

Petitioner was not only tricked into a plea, but the sentence actually received was not the sentence promised, nor the one most appropriate under the circumstances Petitioner labored under at the time of the offenses and at the time of the plea. Petitioner's sentences warranted a probationary sentence in an inpatient treatment program, not 15 to 45 years, especially given Petitioner's age at the time of sentencing.

Petitioner, here, would like to point out that NRS 176A.400 allows the Court to modify the Petitioner's sentence if it is based upon a mistake as to the Petitioner's prior record These sentements are echoed by the Nevada Supreme Court in EDWARDS v. STATE, 918 P.2d 321 (Nev, 1996); see also, STATE ex rel DEP'T OF PRISONS v. KIRKSEY 853 P.2d 109 (Nev, 1993); PASSANISSI v STATE, 831 P 2d 1371 (Nev, 1992); STANLEY v STATE, 787 P.2d 1396 (Nev, 1990); STATE v EIGHTH JUDICIAL DISTRICT COURT, 677 P.2d 1044 (Nev, 1984).

Upon viewing GRIEGO v STATE, 893 P 2d 945 (Nev, 1975), the Court stated (in regard to cruel and unusual punishment), that, "a judge

sentencing a defendant must take into account many factors to make punishments fit the crime, and retribution is just one of them. a sentence may not be based upon retribution alone, and to believe so would be misleading." In STATE v. CHANEY, 477 P.2d 441 (Alaska, 1970), the goals and purposes of sentencing are laid out as follows:

> "... the principles of reformation and necessity of protecting the public constitute the touchstones of penal administration. Multiple goals are encompassed within the broad constitutional standards. Within the ambit of this Constitutional phraseology are found the objectives of: rehabilitation of the offender into a noncriminal member of society; isolation of the offender from society to prevent criminal conduct during the period of confinement; deterrence of the offender himself after his release from confinement or other penalogical treatment; as well as deterrence of other members of the community who might possess tendencies toward criminal conduct similar to that of the offender, or in other words, reaffirmation of societal norms for the purpose of maintaining respect for the norms themselves."

In FAULKNER v. STATE, it was said, determination of an appropriate sentence involves the judicial balancing of many, and oft-times, competing factors, of which primacy cannot be ascribed to any particular factor.

Petitioner would cite SEIM v. STATE, 590 P.2d 1152, (Nev, 1979) where the purpose of probation, in the state of Nevada, is established as follows:

> "Probation is an integral part of the penal system, calculated to provide a period of grace, in order to assist in the rehabilitation of an eligible offender. The broad objective of probation is rehabilitation with incidental public safety, and conditions of probation should further provide this objective. Probation is also to take advantage of an opportunity for reformation which actual service of the suspended sentence might make less probable."

In the past, Petitioner had never been granted any opportunity for rehabilitation, though all of his crimes were committed coupled with drug and alcohol abuse. At his competency exam, it was found that Petitioner may be amenable to treatment. Psychologists and psychiatrists commonly hold that a prison sentence tends to render a defendant's amenability for treatment. Had the Court followed through on the sentencing promises

made to Petitioner may have finally had the chance for proper mental health and drug/alcohol treatment to become a productive member of society, rather than being locked into an illegally-induced plea and a sentence that may feasibly be the rest of Petitioner's natural life given his current state of health. As such, Petitioner's sentence constitutes cruel and unusual punishment and a violation of due process,

AFFIRMATION PURSUANT TO NRS 239B.030

I, MELVIN LEROY GONZALES JR., NDOC# 1018769,

CERTIFY THAT I AM THE UNDERSIGNED INDIVIDUAL AND THAT THE

ATTACHED DOCUMENT ENTITLED PETITION FOR A WRIT

OF HABEAS CORPUS (POSTCONVICTION). / Request to Proceed IFP

DOES NOT CONTAIN THE SOCIAL SECURITY NUMBER OF ANY

PERSONS, UNDER THE PAINS AND PENALTIES OF PERJURY.

DATED THIS 31st DAY OF JANUARY, 2015.

SIGNATURE: Melvin LeRoy Gonzales Jr.

INMATE PRINTED NAME: MELVIN LEROY GONZALES JR.

INMATE NDOC # 1018769

INMATE ADDRESS: ELY STATE PRISON
P. O. BOX 1989
ELY, NV 89301

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

Case No. CV 20,547

Dept. No. II

FILED

2016 MAY 12 PM 2:51

CLERK

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF HUMBOLDT.

-oOo-

MELVIN LEROY GONZALES,

Petitioner,

RENEE BAKER, WARDEN, ELY STATE PRISON

Respondent.

STATE'S RESPONSE TO PETITIONERS' PETITION FOR WRIT OF HABEAS CORPUS POST-CONVICTION

COMES NOW, the State of Nevada, by and through Anthony R. Gordon, Humboldt County Deputy District Attorney, and hereby responds to the Petitioner's Petition for Writ of Habeas Corpus (Post-Conviction). This Response is based upon the attached Points and Authorities and all the pleadings and papers on file herein.

Pursuant to NRS 239B.030, the undersigned hereby affirms this document does not contain the social security number of any person.

DATED this 12th day of May, 2016.

ANTHONY R. GORDON
Deputy District Attorney

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

POINTS AND AUTHORITIES

FACTS

On January 17th, 2013, Petitioner was arrested by the Humboldt County Sheriff's Office for aggravated stalking charges against his ex-wife Connie Ramirez and her parents, who lived in Humboldt County, Nevada. Subsequently, on January 7, 2014, pursuant to a guilty plea agreement Petitioner entered pleas of guilty to three counts of aggravated stalking, a Category B. Felony, in violation of NRS 200.575(2) and was thereafter sentenced on April 15, 2014 to three consecutive terms of a minimum of sixty two to one hundred fifty-six months in the Nevada Department of Corrections. Petitioner filed a Writ of Habeas Corpus (Post-Conviction) on November 16, 2015, and while Petitioner indicates that he served his writ on Humboldt County, Nevada on the 5th day of November 2015, a copy of Petitioner's Writ of Habeas Corpus (Post-Conviction) was never received by this office until a copy was procured from the Humboldt County Clerks' Office on April 11, 2016, after Respondent received on April 9, 2016, a non-filed and non-dated copy of Petitioner's Notice of Entry of Default against Respondent.

LEGAL ARGUMENT

As grounds for the Petitioner's Petition for Writ of Habeas Corpus (Post-Conviction), he pleads five grounds of ineffective assistance of counsel; one ground alleging that his convictions were in violation of his fundamental Due Process rights under the 5th, 6th and 14th Amendments to the U.S. Constitution and under Article 1, Sections 8 and 10 of the Nevada Constitution; and a final ground that his convictions violated Due Process because there was cruel and unlawful punishment inflicted during his sentencing procedures in violation of his rights under the 5th,6th, 8th and 14th Amendments to the U.S. Constitution and under Article 1, Sections 6,8 and 10 of the Nevada Constitution. All Petitioner's allegations are groundless and are not supported factually by the record or legally under relevant statutory and Federal and Nevada Constitutional Law. As

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

a result, Petitioner's Writ of Habeas Corpus (Post-Conviction) must be denied in its entirety. For ease of reference, each substantive allegation will be dealt with individually as noted.

I.

INEFFECTIVE ASSISTANCE OF COUNSEL (GROUNDS 1-5)

As noted above, the Petitioner alleges five individual grounds of ineffective assistance of counsel in violation of his 6th and 14th Amendments to the U.S. Constitution. (*See* Petitioner's Petition for Writ of Habeas Corpus (Post-Conviction), pages 14-17). While the Sixth Amendment to the United States Constitution guarantees effective assistance of counsel at trial, in order to establish a claim of ineffective assistance of counsel, the Petitioner must first show that counsel's performance fell beneath "an objective standard of reasonableness" *Strickland v. Washington*, 466 U.S. 668, 688 (1984). Only when the Petitioner has shown that counsel's performance fell beneath "an objective standard of reasonableness" and a deficiency therefore exists, the Petitioner must then show, but for his counsel's deficiency, a different result would have been had at trial. *Id* at 694; *Rubio v. State*, 124 Nev 1032, 1040, 194 P.3d 1224, 1229 (2008).

In *Oliver v. State*, 281 P.3d 1206 (Nev., 2009), the Nevada Supreme Court held that in order to state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a petitioner must demonstrate that his counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability that, but for counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 57, 58–59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); *Kirksey v. State*, 112 Nev. 980, 978–88, 923 P.2d 1102, 1107 (1996). According to *Oliver, supra* at 1206, the court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one. *Strickland v. Washington*, 466 U.S. 668, 697, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

In order to establish an objective standard of reasonableness, the court must look to the "prevailing professional norms" of legal practice, *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (quoting *Strickland*, 466 U.S. at 688). Additionally, effectiveness does not mean errorless and courts have noted that effectiveness means performance "within the range of competence demanded of attorneys in criminal cases." *Jackson v. Warden, Nev. State Prison*, 91 Nev. 430, 43[2], 537 P,2d 473, 474 (1975) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)). Courts have noted that effectiveness encompasses making "sufficient inquiry into the information that is pertinent" to the case in order to make "a reasonable strategy decision on how to proceed with a client's case." *See Doleman v, State*, 112 Nev. 843, 848, 921 P.2d 278, 280 (1996) (*citing Strickland*, 466 U.S. at 690-91). Furthermore, courts have held that strategic decisions made by trial counsel are assumed to be intentional and are "virtually unchallengeable." *Doleman*, 112 Nev. at 848, 921 P,2d at 280 (quoting *Howard v. State*, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990), strategic decisions based on an incomplete investigation are reasonable "precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland, supra* 466 U.S. at 690-91).

Secondarily, even if a Petitioner can establish deficient performance of his trial counsel, he must then establish "prejudice" by a showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. (*Id.* at 687.) Proving prejudice requires the defendant to "show that there is a reasonable probability that, "but" for counsel's unprofessional errors, the result of the proceeding would have been different. In these situations, reasonable probability is defined as "a probability sufficient to undermine the confidence of the outcome" with a court hearing claims of ineffective assistance of counsel considering the totality of the evidence in determining prejudice. *Id.*

In *Morales v. State* (Nev., 2014) the court held that to prove ineffective assistance of

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

appellate counsel a petitioner "must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that the omitted issue would have a reasonable probability of success on appeal," *citing Kirksey v. State,* 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996), *Morales, supra* at page 8. The *Morales* court further noted that "Appellate counsel is not required to raise every non-frivolous issue on appeal," *citing Jones v. Barnes,* 463 U.S. 745, 751 (1983), and that "[r]ather, appellate counsel will be most effective when every conceivable issue is not raised on appeal," *citing Ford v. State,* 105 Nev. 850, 853, 784 P.2d 951, 953 (1989), *Morales, supra* at page 8. Thirdly, the *Morales* court also noted that "[b]oth components of the inquiry must be shown," citing *Strickland v. Washington,* 466 U.S. 668, 697 (1984), and that they will "give deference to the court's factual findings if supported by substantial evidence and not clearly erroneous but review the court's application of the law to those facts de novo," *citing Lader v. Warden,* 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005), *Morales, supra* at page 9.

Finally, as to claims of ineffective assistance of trial counsel at the sentencing proceeding, according to the Nevada Supreme Court in *Oliver,* to state a claim of ineffective assistance of counsel sufficient to warrant a new sentencing hearing, a petitioner must demonstrate that that his counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different. *Oliver, supra* 281 P.3d at 1206, citing *Strickland v. Washington,* 466 U.S. at 694; and *Weaver v. Warden,* 107 Nev. 856, 858--59, 822 P.2d 112).

Petitioner's first allegation of ineffective assistance of counsel is his belief that his trial counsel lied to him in order for him to waive his preliminary hearing based on the fact that the district attorney, had or will file, a habitual criminal charge against Petitioner if he did not waive

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

his preliminary hearing and enter a guilty plea in order to avoid serving life without parole in state prison. Petitioner's assertions are similar to the factual situation that the Nevada Supreme Court faced in *Hargrove v. State,* 100 Nev. 498, 686 P.2d 222 (1984), where the defendant in *Hargrove* contented that he plead guilty without the effective advice and assistance of counsel, that his plea was the produce of his "fear" of an habitual criminal sentence, and that he was innocent of the charge against him. *Hargrove, supra* 686 P.2d at 225. In rejecting the defendant's contentions in Hargrove in a motion to withdraw a plea of guilty, the court held that merely naked allegations did not entitle the appellant to an evidentiary hearing and noted:

> "In particular, appellant's claim that he pleaded out of "fear" of an aggravated sentence as an habitual criminal is meritless. The record in this case shows a knowing and voluntary plea. Furthermore, "a defendant's desire to plead guilty to an original charge in order to avoid the threat of the habitual criminal statute will not give rise to a claim of coercion." *Schmidt v. State,* 94 Nev. 665, 667, 584 P.2d 695, 696 (1978); *see Whitman v. Warden,* 90 Nev. 434, 529 P.2d 792 (1974). *Hargrove, supra* 686 P.2d at 225-226.

Like the defendant in *Hargrove*, Petitioner here makes blanket and unsupported assertions that his trial counsel lied to him and that he had no idea what was happening with his case. However, as in the situation in *Oliver v. State*, supra, where the appellant claimed that his trial counsel was ineffective because he coerced appellant into pleading guilty by informing him that he would lose if he went to trial, the court held:

> "Appellant failed to demonstrate that trial counsel was deficient or that he was prejudiced by trial counsel's performance. Candid advice about the possible outcome of trial is not evidence of a deficient performance. Appellant acknowledged in the guilty plea agreement that his guilty plea was voluntary, that he signed with the advice of counsel, and that his plea was not the result of any threats, coercion or promises of leniency. At the plea canvass, appellant acknowledged that his plea was given freely and voluntarily, without threats or promises. In addition, at the plea canvass, appellant was informed of the potential sentences he could receive, for both the attempted sexual assault count and the fourth-degree arson count. Therefore, we conclude that the district court did not err in denying this claim." *Oliver, supra* at 1207.

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

In the present case, all Petitioner alleges in his Writ of Habeas Corpus (Post-Conviction) are "naked" allegations which are not supported by the record, and even belied by the plea canvas here as it was in *Hargrove, supra* where the Petitioner voluntarily acknowledged before this court that his plea was freely and voluntarily given. Petitioner's counsel relayed the fact to him that Petitioner faced a habitual criminal charge under NRS 207.010 based on his past criminal record, a fact that he does not deny could have been leveled against him. This is hardly performance by a trial counsel that falls below an objective standard of reasonableness under *Oliver, supra.* As a result, Petitioner has simply failed to demonstrate any deficiency or prejudice on this claim under *Strickland supra* or *Morales v. State, supra.*

Petitioner's second allegation of ineffective assistance of counsel is his belief that his trial counsel failed to request permission from the court to retain certain expect witnesses to conduct a new evaluation to determine his competency to accept a guilty plea, waive his preliminary hearing, to determine his mens-rea at the time of the crime, and to determine his potential for rehabilitation or mitigation for sentencing. *See* Petitioner' Writ of Habeas Corpus (Post-Conviction) pages 15-16.

Petitioner's assertions here as to this ground are not supported by any affidavits or names of any expert witnesses who could or would assert to these alleged facts now raised by Petitioner in order to show that there would have been any different result from his previously conducted mental evaluation by two state Nevada licensed psychologists who found that he met the criteria to be considered competent to proceed with adjudication against him, as will be discussed in more detail *infra.* Petitioner here is just speculating to what any such expert witness would find and has not shown that there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different as required by *Oliver, supra.* As a result, Petitioner

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

has simply failed to demonstrate any deficiency or prejudice on this claim under *Strickland supra* or *Morales v. State, supra.*

Petitioner's third allegation of ineffective assistance of counsel is his belief that his trial counsel failed to interview any witnesses, but again no specific information is set forth in his Writ for Habeas Corpus (Post-Conviction) as to what, if anything, such witnesses would even say, especially as to the crimes he was convicted of, three counts of aggravated stalking in violation of NRS 200.575(2). The Nevada Supreme Court in *Hargrove, supra* cited with approval *Wright v. State,* 5 Kan.App 2nd 494, 619 P.2d 155 (1980) which held that to entitle a defendant to an evidentiary hearing, a post-conviction petition must set forth "a factual background, names of witnesses or other sources of evidence demonstrating...entitlement to relief." *Hargrove, supra* 686 P.2d at 225. *See also Grondin v. State,* 97 Nev. 454, 634 P.2d 456 (1981) for the principle that a defendant seeking post-conviction relief is not entitled to an evidentiary hearing on factual allegations belied or repelled by the record and *Doleman v State, supra,* quoting *Howard v. State,* 106 Nev. 713, 722, 800 P.2d 175, 180 (1990), that strategic decisions based on an incomplete investigation are reasonable "precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland, supra* 466 U.S. at 690-91, *Doleman, supra,* 112 Nev. at 848, 921 P,2d at 280. In the present case, having asserted no factual information on what any witnesses would have produced if Petitioner's trial counsel would have interviewed any witnesses requested by Petitioner, Petitioner has simply failed to demonstrate any deficiency or prejudice on this claim under *Strickland supra* or *Morales v. State, supra.*

Petitioner's fourth allegation of ineffective assistance of counsel is his claim that trial counsel threateningly induced him into a plea agreement. As noted above under *Hargrove, supra,* a defendant's desire to plead guilty to an original charge in order to avoid the threat of the

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

habitual criminal statute will not give rise to a claim of coercion, *Hargrove, supra* 686 P.2d at 225-226, as well as *Oliver, supra,* for the proposition that candid advice about the possible outcome of trial is not evidence of a deficient performance, *Oliver, supra* at 1207. In the present case, as noted above, Petitioner acknowledged in the guilty plea agreement that his guilty plea was voluntary, he signed it with the advice of counsel, and that his plea was not the result of any threats, coercion or promises of leniency. Just because Petitioner failed to achieve his end goals of avoiding prison time by entering into his guilty plea agreement in this case is simply not enough to demonstrate any deficiency or prejudice for a valid ineffective assistance of counsel claim under *Strickland supra* or *Morales v. State, supra.*

Petitioner's fifth and final allegation of ineffective assistance of counsel is his claim that his trial counsel failed or refused to file a motion to withdraw his guilty plea. Petitioner's arguments that he did not receive the sentence and treatment he wanted are similar to the arguments he raises in his final allegations below dealing with cruel and unusual punishment. In that final ground, discussed infra, Petitioner alleges that his rights were violated since he was sentenced outside the promised guidelines of minimum concurrent sentences to allow for his possible treatment and rehabilitation. (See Petitioner's Petition for Writ of Habeas Corpus (Post-Conviction), page 17,19). While the response to Petitioner's allegations in his final claim are similar to his grounds for ineffective course here, for ease of reference they won't be repeated here, other than to note that under *Hargrove, supra,* in a similar attempt to withdraw a plea of guilty, the court noted that "naked" allegations in his motion to withdraw his guilty plea did not entitle appellant to an evidentiary hearing, *citing Vaillancourt v. Warden,* 90 Nev. 431, 529 P.2d 204 (1974) and *Fine v. Warden*, 90 Nev. 166, 521 P.2d 374 (1974). *Hargrove, supra* 686 P.2d at 225.

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

Additionally, the Nevada Supreme Court in *Norwood v. State*, 112 Nev. 438, 915 P.2d 177 (1996), ruled that a sentencing judge has wide discretion in imposing a sentence, and that determination will not be overruled absent a showing of abuse of discretion. Here the Petitioner does not allege that the district court abused its discretion in sentencing him to three consecutive terms of a minimum of sixty two to one hundred fifty-six months in the Nevada Department of Corrections based on the record before it and his past criminal history, which included six prior felony convictions, five prison terms and four jail terms, as delineated in Petitioner's Presentence Investigation Report prepared by the Nevada State Department of Public Safety/Division of Parole & Probation. As the court in *Oliver, supra,* noted "[c]andid advice about the possible outcome of trial is not evidence of a deficient performance," especially here like in the factual situation in *Oliver, supra,* "Appellant acknowledged in his guilty plea agreement that his guilty plea was in fact voluntary, that he signed it with the advice of counsel, and that his plea was not the result of any threats, coercion or promises of leniency. *Oliver, supra* at 1207. The fact remains that just because one is not happy with his or her final sentence, and "feared the results" as Petitioner claims, does not make his final sentence unconstitutional, an abuse of the district court's decision, or even in violation of the 8th Amendment to the U.S. Constitution, as stated in *Schmidt v. State*, 94 Nev. 695, 697. (1978) where the court held that a sentence of imprisonment which is within the limits of a valid statute, regardless of its severity, is normally not considered cruel and unusual punishment in the Constitutional Sense. *See also United States v. Johnson,* 507 F.2d 826 (7th Cir. 1974), Cert. den. 421 U.S. 949, 95 S.Ct. 1682, 44 L.Ed.2d 103 (1975). As a result, Petitioner allegations here that he get not get the sentence and rehabilitation from the court that he wished for does not by itself demonstrate any deficiency or prejudice on this claim under *Strickland supra* or *Morales v. State, supra,* so Petitioner's final ineffective assistance claim must fail as well.

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

II.

DUE PROCESS ALLEGATION (GROUNDS 6)

Petitioner alleges that he was deprived of his life and liberty without due process of law alleging that he was not unaware of the true nature and consequences of his plea due to his state of mental instability caused by intoxication due to forced and volatile mixture of psychotropic medication resulting in impaired judgement. Additionally, Petitioner further alleges that his plea was not knowing and voluntary made because he was not receiving properly monitored psychiatric care at the Humboldt County Detention Center, having at the time taking two sedatives which contradicted each other. Petitioner cites *Riggins v. Nevada,* 504 U.S. 127 (1992) in support of his legal theory that he was involuntary medicated against his will, but the record below does not support his contentions since the facts of this case and *Riggins, supra* are legally distinguishable from each other.

The U.S. Supreme Court in *Riggins* dealt with the narrow issue of whether the forced administration of antipsychotic medication during trial violated a defendant's right to a full and fair trial guaranteed by the Sixth and Fourteenth Amendments to the U.S. Constitution. *Id* at 133. In *Riggins*, the defendant was placed on antipsychotic medication in jail after his arrest and was later ruled competent to stand trial by two of three psychiatrists. *Id* at 130. Before trial the defendant moved the court to terminate the administration of his antipsychotic medication until the end of his trial in order to show the jury that his mental state was consistent with his insanity defense. *Id.* However, the district court denied Riggins' motion, which was affirmed on appeal by the Nevada Supreme Court on the ground that since expert testimony was offered during the trial it was deemed "sufficient to inform the jury of the effect of the antipsychotic drug Mellaril on

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

Riggins' demeanor and testimony." *Id* at 132. In reversing the conviction against Riggins, the U.S. Supreme Court remanded the case since the record contained no finding that might support a conclusion that the administration of antipsychotic medication was necessary to accomplish an essential state policy. *Id* at 138.[1] Before the *Riggins* court reached this conclusion it cited with approval their previous discussion regarding the involuntary administration of psychotic drugs in *Washington v. Harper,* 494 U.S. 210 (1990) by noting that "[t]aking account of the unique circumstances of penal confinement, however, we determined that due process allows a mentally ill inmate to be treated involuntarily with antipsychotic drugs where there is a determination that "the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest." *Harper, supra* at 494 U.S. at 227; *Riggins, supra* at 134-135. The *Riggins* court then noted:

> "Under *Harper,* forcing antipsychotic drugs on a convicted prisoner is impermissible absent a finding of overriding justification and a determination of medical appropriateness. The Fourteenth Amendment affords at least as much protection to persons the State detains for trial. See *Bell v. Wolfish,* 441 U.S. 520, 545, 99 S.Ct. 1861, 1877, 60 L.Ed.2d 447 (1979) ("[P]retrial detainees, who have not been convicted of any crimes, retain at least those constitutional rights that we have held are enjoyed by convicted prisoners"); *O'Lone v. Estate of Shabazz,* 482 U.S. 342, 349, 107 S.Ct. 2400, 2404, 96 L.Ed.2d 282 (1987) ("[P]rison regulations . . . are judged under a 'reasonableness' test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights"). Thus, once Riggins moved to terminate administration of antipsychotic medication, the State became obligated to establish the need for Mellaril and the medical appropriateness of the drug.
>
> Although we have not had occasion to develop substantive standards for judging forced administration of such drugs in the trial or pretrial settings, Nevada certainly would have satisfied due process if the prosecution had demonstrated and the District Court had found that treatment with antipsychotic medication was medically appropriate and, considering less intrusive alternatives, essential for the sake of Riggins' own safety or the safety of others. See *Harper, supra,* 494 U.S., at 225-226, 110 S.Ct., at 1039; cf. *Addington v. Texas,* 441 U.S. 418, 99 S.Ct.

[1] It should be noted that the U.S. Supreme Court in *Riggins* noted that "[t]he question whether a competent criminal defendant may refuse antipsychotic medication if cessation of medication would render him incompetent at trial is not before us." *Riggins, supra* 504 U.S. at 136.

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

> 1804, 60 L.Ed.2d 323 (1979) (Due Process Clause allows civil commitment of individuals shown by clear and convincing evidence to be mentally ill and dangerous). Similarly, the State might have been able to justify medically appropriate, involuntary treatment with the drug by establishing that it could not obtain an adjudication of Riggins' guilt or innocence by using less intrusive means. See *Illinois v. Allen*, 397 U.S. 337, 347, 90 S.Ct. 1057, 1063, 25 L.Ed.2d 353 (1970) (Brennan, J., concurring) ("Constitutional power to bring an accused to trial is fundamental to a scheme of 'ordered liberty' and prerequisite to social justice and peace"). *Riggins, supra* at 135.

The U.S. Supreme Court's decision in *Riggins* is not applicable to the present situation since the Petitioner here, other than his unsupported assertions, never made a motion to terminate his use of antipsychotic medication like the defendant in *Riggins*, so the fact that his use of antipsychotic medication was, in fact involuntary or forced, is not supported by the record. This fact is particularly significant since the court in *Riggins* noted that once the district court denied Riggin's motion to terminate use of his antipsychotic medication, the subsequent administration of the drug was involuntary. *Id* at 133. Additionally, Petitioner here offers no medical evidence to substantiate his claim that he was in fact "involuntary or forcibly" medicated at his plea and sentencing hearing and this issue is contradicted by the record itself at the time of his sentencing, where the record below shows that Petitioner knew what he did and the consequences of his actions, as demonstrated by Petitioner's allocation to the trial court where he stated: "No matter what happens right now, I just wanted to apologize. I should have never – I had no reason. You know, these people are nice people. Me and OsaFae don't see eye to eye. But still, no matter what, I had no reason, no business terrifying them like that. I just want to apologize you to guys." The record below is completely devoid of any indication that Petitioner had no idea what was going on at either his plea or sentencing due to his alleged state of medical intoxication or lack thereof.

Petitioner's case is more like the attempted misapplication of *Riggins* in *Servin v. State*, 117 Nev. 775, 32 P.3d 1277 (2001), where the defendant in *Sevin* asked the Nevada Supreme

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

Court to apply *Riggins* in an unprecedented manner since a witness against him was medicated at trial and not the defendant himself. *Sevin, supra* 32 P.3d at 1284. In denying the invitation to overstretch the rule in *Riggins,* the Nevada Supreme Court in *Sevin* concluded that the contention that the district court erred by allowing the manipulation of evidence was without support. *Id.* In the present case, since not only is no evidence in the record that Petitioner was forcible medicated against his will, he never asked this court to stop the administration of his antipsychotic medication, and most importantly, there is no evidence of the U.S. Supreme Court's concerns of the manipulation of evidence at trial, which was the underlying rationale itself in *Riggins, supra. See also Bolton v. Cosgrove* (N.D. Ca., 2016), where the court dismissed a prisoners civil rights action under 42 U.S.C.§1983 for failure to state a claim upon which relief may be granted under 28 U.S.C.§1915A(a), and ruled that in any future amended complaint if the plaintiff wanted "to try to state a claim that he was forcibly medicated, he needs to identify the particular doctors who caused him to be forcibly medicated and the dates on which he was forcible medicated in his amended complaint." Bolton, supra at page 4.). As a result, for the reasons stated above, Petitioner's ground here for relief is without merit and must fail as well.

III.

CRUEL AND UNUSUAL PUNISHMENT ALLEGATION (GROUNDS 7)

In Petitioner's final ground of error, he alleges that his rights were violated since he was sentenced outside the promised guidelines of minimum concurrent sentences in order to allow for his treatment and rehabilitation. (*See* Petitioner's Petition for Writ of Habeas Corpus (Post-Conviction), page 19). While the Respondent in the signed Guilty Plea Agreement filed January 7, 2014 agreed to recommend that the penalty on each count run concurrent to each other, the same Guilty Plea Agreement that Petitioner signed and plead to in open court indicated that he had not "been promised or guaranteed any particular sentence by anyone," that "I know that my

///

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

sentence is to be determined by the court within the limits prescribed by statute," and that the "sentencing judge has the discretion to order the sentences served concurrently or consecutively." Just because Petitioner's trial counsel at sentencing failed to convince the court otherwise does not make his performance deficient in order for it to fall below an objective standard of reasonableness. *See Oliver, supra* 281 P.3d at 1206, *citing Strickland v. Washington,* 466 U.S. at 694; and *Weaver v. Warden,* 107 Nev. 856, 858–59, 822 P.2d 112).

The Nevada Supreme Court has previously ruled that a sentencing judge has wide discretion in imposing a sentence, and that determination will not be overruled absent a showing of abuse of discretion, *Norwood v. State*, 112 Nev. 438, 915 P.2d 177 (1996), citing *Houk v. State,* 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987). Additionally, a sentencing court is privileged to consider facts and circumstances which would clearly not be admissible at trial. *Silks v. State,* 92 Nev. 91, 93-94, 545 P.2d 1159, 1161 (1976). Furthermore, it is well established law in Nevada that the legislature, within Constitutional limits, is empowered to define crimes and determine punishments and that the courts are not to encroach upon this domain lightly. *Schmidt v. State,* 94 Nev. 695, 697. (1978). *See also Egan v. Sheriff,* 88 Nev. 611, 503 P. 2d 16 (1972); *Deveroux v. State*, 96 Nev, 388, 610 P.2d 338 (1980) and *Sheriff v. Williams*, 96 Nev. 22, 604 P.2d 800 (1980). There is also a general presumption in Nevada favoring the validity of statutes which dictates a recognition of their constitutionality unless a violation of Constitutional principles is clearly apparent. *Schmitz Supra* at 697. Similar to *Norwood, supra*, the court in *Deveroux* noted that the trial judge has wide discretion in imposing a prison term and, in the absence of a showing of abuse of such discretion, this court will not disturb the sentence. *Deveroux Supra* at 723. *See also State v. Sala*, 63 Nev. 270, 169 P.2d 524 (1946). The degree to which a judge considers age and the absence of a prior record of offenses is within his or discretionary authority. *Deveroux Supra* at 723. Finally, this court has held that a sentence of

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

imprisonment which is within the limits of a valid statute, regardless of its severity, is normally not considered cruel and unusual punishment in the Constitutional Sense. *Schmidt Supra* at 665. *United States v. Johnson*, 507 F.2d 826 (7th Cir. 1974), Cert. den. 421 U.S. 949, 95 S.Ct. 1682, 44 L.Ed.2d 103 (1975).

In the present case, the Petitioner was sentenced under NRS 200.575(2), where the legislature provided a term of imprisonment for Aggravated Stalking, a Controlled Substance, a Category B Felony, as a minimum term of not less than two (years) to a maximum term of not more than fifteen (15) years in Nevada Department of Corrections, along with a possible fine of not more than $5,000. As noted above, the sentencing court below had before it Appellant's Presentence Investigation Report prepared by the Nevada State Department of Public Safety/Division of Parole & Probation which detailed Appellant's background, the current offense which he pled guilty to, as well as his extensive criminal history, which was before the court below and included six prior felony convictions, five prison terms and four jail terms. As a result, based on the Appellant's past extensive criminal history in Nevada, Arizona, and in the State of California, the trial court sentenced the defendant to serve three consecutive terms of a minimum of sixty two to one hundred fifty-six months in the Nevada Department of Corrections, terms of imprisonment well within the statutory limits and within the trial court's discretion, as allowed under *Norwood v. State, supra,* nor was Petitioner's sentences contrary of the Due Process Clause of the Fifth Amendment to be considered cruel and unusual punishment under *Schmidt Supra* at 665. *United States v. Johnson*, 507 F.2d 826 (7th Cir. 1974), Cert. den. 421 U.S. 949, 95 S.Ct. 1682, 44 L.Ed.2d 103 (1975).

Finally, Petitioner asserts without any evidence that his trial counsel and the prosecutor at the time took advantage of his mental instability due to involuntary intoxication caused by his psychotropic mediations. However, the trial record instead shows that on February

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

27, 2013, after being evaluated by two Nevada licensed psychologists at Lakes Crossing in Sparks, Nevada, Sally Farmer, Ph.D. and Amy E. Patterson, PhD, the Petitioner was found to meet the criteria to be considered competent to proceed with adjudication against him. Additionally, in the present case, as in *Oliver, supra*, the plea canvass shows that Petitioner acknowledged that his plea was given freely and voluntarily, without threats or promises, and that he was informed of the potential sentences he could receive for the crimes he was pleading guilty to. *Oliver, supra* 281 P.3d at 1207. There is simply no evidence in the trial record to indicate that Petitioner was taken advantage of by his trial counsel or either "tricked into a plea" as he presently claims, as compared to the simple fact that Petitioner did not get the sentence of probation and rehabilitation that he had hoped for.

CONCLUSION

Based on the above legal arguments and all facts and pleadings herein, the Petitioner has failed on all his allegations of Nevada Statutory and U.S. Constitutional error alleged in this Petition for Writ of Habeas Corpus (Post-Conviction). Accordingly, it is respectfully requested that this court deny the Petitioner's Petition for Writ of Habeas Corpus (Post-Conviction) in this entirety.

Furthermore, pursuant to NRS 239B.030., the undersigned hereby affirms this document does not contain the social security number of any person.

DATED this 12th day of May, 2016.

ANTHONY R. GORDON
Deputy District Attorney

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) I certify that I am an employee of the Humboldt County District Attorney's Office, and that on the _____ day of May, 2016, I delivered a copy of the **STATE'S RESPONSE TO PETITIONER'S PETITION FOR WRIT OF HABEAS CORPUS POST-CONVICTION** to:

MELVIN LEROY GONZALES #1018769
Lovelock Correctional Center
1200 Prison Road
Lovelock, NV 89419

ADAM L. WOODRUM, ESQ.
Woodrum Law LLC
3470 East Russell Road, Suite 212
Las Vegas, Nevada 89120

ADAM PAUL LAXALT
Nevada Attorney General
100 N. Carson Street
Carson City, NV 89701

( ) U.S. Mail
( ) Certified Mail
( ) Hand-delivered
( ) Placed in DCT Box
( ) Via Facsimile

_____

Code: 3565
KARLA K. BUTKO, ESQ.
State Bar No. 3307
1030 Holcomb Ave.
Reno, Nevada 89502
(775) 786-7118
Attorney for Petitioner

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF HUMBOLDT

MELVIN LEROY GONZALES,

Petitioner,

vs.

Case No. CV 20,547

THE STATE OF NEVADA,

Dept. No. 2

Respondent.
_____/

SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)

This Supplemental Petition is filed pursuant to Nevada Revised Statutes 34.735, et. seq.

1. Name of institution and county in which you are presently imprisoned or where and how you are presently restrained of your liberty: Petitioner is incarcerated at the Lovelock Correctional Center, Lovelock, Nevada.
Inmate Number 1018769

2. Name and location of court which entered the judgment of conviction under attack: Sixth Judicial District Court of the State of Nevada, Winnemucca, Humboldt County, Nevada.

3. Date of judgment of conviction: April 22, 2014.

4. Case Number: CR13-6257.

5. (a) Length of sentence:

The Court sentenced Petitioner as follows:

I: One hundred fifty-six months (156) in the Nevada State Prison with the possibility of parole after service of sixty-two (62) months in prison, granted 453 days credit time served;

II: One hundred fifty-six months (156) in the Nevada State Prison with the possibility of parole after service of sixty-two (62) months in prison;

III. One hundred fifty-six months (156) in the Nevada State Prison with the possibility of parole after service of sixty-two (62) months in prison;

All sentences were ordered to be served consecutively.

(b) If sentence is death, state any date upon which execution is scheduled: N/A

6. Are you presently serving a sentence for a conviction other than the conviction under attack in this motion? Yes____ No X

If "yes," list crime, case number and sentence being served at this time:

7. Nature of offense involved in conviction being challenged:

Count I: Aggravated Stalking, A Category B felony violation of NRS 200.575(2)(a).

8. What was your plea (check one)
(a) Not Guilty ____
(b) Guilty XX
(c) Guilty but mentally ill
(d) Nolo contendere ____

9. If you entered a plea of guilty or guilty but mentally ill to one count of an indictment or information, and a not guilty plea to another count of an indictment or information, or if a plea of guilty or guilty but mentally ill was negotiated, give details:

Petitioner agreed to plead guilty to three counts of Aggravated Stalking, a Category B felony in violation of NRS 200.575(2)(a). No other charges would be pursued against him and the parties were free to argue for an appropriate sentence.

10. If you were found guilty after a plea of not guilty, was the finding made by: (check one)
(a) Jury ____
(b) Judge without a Jury ____

11. Did you testify at the trial? Yes ____ No ___ N/A

12. Did you appeal from the judgment of conviction?

Yes__XX__ No _____

13. If you did appeal, answer the following:
(a) Name of Court: Nevada Supreme Court
(b) Case number or citation: 65768
(c) Result: Order of Affirmance
(d) Date of result: November 12, 2014
Remittitur date: December 8, 2014

(Attach copy of order or decision, if available.)

14. If you did not appeal, explain briefly why you did not:

15. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any court, state or federal? Yes_____ No_XX__

16. If you answer to No. 15 was "yes," give the following information:

(a)(1) Name of court:
(2) Nature of proceeding:
(3) Grounds raised:
(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ____ No ____
(5) Result:
(6) Date of result:
(7) If known, citations of any written opinion or date of orders entered pursuant to such result:

(b) As to any second petition, application or motion, give the same information
(1) Name of court:
(2) Nature of proceeding:
(3) Grounds raised:
(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ____ No ____
(5) Result:
(6) Date of result:
(7) If known, citations of any written opinion or date of orders entered pursuant to such result:

(c)As to any third or subsequent additional applications or motions, give the same information as above, list them on a separate sheet and attach.

(d) Did you appeal to the highest state or federal court having jurisdiction, the result or action taken on any petition, application or motion?

(1) First petition, application or motion? Yes____ No

Citation or date of decision:

(2) Second petition, application or motion? Yes____ No

Citation or date of decision:

(3) Third or subsequent petitions, applications or motions? Yes ____ No ____

Citation or date of decision:

(e) If you did not appeal from the adverse action of any petition, application or motion, explain briefly why you did not. (You must relate specific facts in response to this question. Your response may be included on paper which is 8½ by 11 inches attached to the petition. Your response may not exceed five handwritten or typewritten pages in length.

17. Has any ground being raised in this petition been previously presented to this or any other court by way of petition for habeas corpus, motion, application or any other post-conviction proceeding? If so, identify: N/A

(a) Which of the grounds is the same:

(b) The proceedings in which these grounds were raised:

(c) Briefly explain why you are again raising these grounds. (You must relate specific facts in response to this question. Your response may be included on page which is 8½ by 11 inches attached to the petition. Your response may not exceed give handwritten or typewritten pages in length.)

18. If any of the grounds listed in Nos. 23(a), (b), (c) and (d), or listed on any additional pages you have attached, were not previously presented in any other court, state or federal, list briefly what grounds were not so presented, and give your reasons for not presenting them. (You must relate specific facts in response to this question. Your response may be included on page which is 8½ by 11 inches attached to the petition. Your response may not exceed give handwritten or typewritten pages in length.)

19. Are you filing this petition more than 1 year following the filing of the judgment of conviction or the filing of a decision on direct appeal? If so, state briefly your reasons for delay. (You must relate specific facts in response to this question. Your response may be included on page which is 8½ by 11 inches attached to the petition. Your response may not exceed give handwritten or typewritten pages in length.)

Petitioner states said Petition was timely filed within one year of the Remittitur Date, petition filed November 16, 2015, Remittitur issued December 8, 2014.

20. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes ____ No __X__

21. Give the name of each attorney who represented you in the proceeding resulting in your conviction and on direct appeal: Steven Cochran, Esq., Public Defender for Pershing County, was appointed and represented Petitioner at the District Court stages of the case and on direct appeal.

22. Do you have any future sentences to serve after you complete the sentence imposed by the judgment under attack? Yes __XX__ No ____

If yes, specify where and when it is to be served, if you know:

I have two cases, CR10-2272 & CR11-0996, the sentences were imposed consecutive to each other. Both sentences are to be served in the Nevada Department of Corrections.

23. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary you may attach pages stating additional grounds and fact supporting same.

Petitioner was deprived of effective assistance of counsel, within the meaning of the 6th and 14th Amendments to the United States Constitution.

Note: Petitioner incorporates by reference the allegations of his Petition for Writ of Habeas Corpus (Post-conviction) filed November 16, 2015.

Ground one:

Counsel failed to adequately prepare and investigate. Counsel failed to file pre-trial motions to suppress the property located at the Economy Inn, Room #114, Winnemucca, Nevada when in fact the search by the police of that hotel room was an unconstitutional search, without a warrant, in violation of the Fourth & Fourteenth Amendments to the United States Constitution.

Ground two:

Counsel failed to provide testimony and witnesses that would demonstrate that the Petitioner was too intoxicated to be able to formulate intent and that the text messages were not something that would ever have been acted upon by Petitioner; available witnesses would testify that Petitioner suffered from mental health issues

and when on appropriate medications operates within society's rules; the failure to prepare and investigate mental health issues prejudiced the defense case, in violation of the Fifth, Sixth and Fourteenth Amendments.

Ground three:

The guilty plea was coerced by counsel, thus making the plea an involuntary plea; the guilty plea was of no value and operated as a straight up guilty plea; Petitioner would have proceeded to trial if counsel had fought the burglary, possession of stolen property and possession of controlled substance charge that Petitioner would not have pled guilty to three counts of aggravated stalking, with no sentencing concession by the State; Counsel was ineffective in recommending a guilty plea that had no value, in violation of the Fifth, Sixth and Fourteenth Amendments.

Ground Four:

Counsel should have filed a motion for severance of the charges. Failure to do so created a setting wherein Petitioner gave up and pled guilty to the three counts of aggravated stalking when in fact Petitioner would have proceeded to trial if the cases were severed, in violation of the Fourth, Fifth, Sixth & Fourteenth Amendments to the United States Constitution.

Ground Five:

Counsel was ineffective for proceeding to jury trial on the three counts of aggravated stalking; the jury would have received instruction on NRS 200.575(3), which is the proper charge if the mental health defense did not result in acquittal.

Ground Six:

Counsel was ineffective at sentencing for failing to present mental health records in support of Petitioner's mental health issues, his ability to be treated by proper medication and to not present a danger to the community when properly cared for by mental health professionals, in violation of the Fifth, Sixth and Fourteenth Amendments.

POINTS AND AUTHORITIES

Ground One: Motion to suppress property and controlled substance seized at Economy Inn, Room 114:

The Fourth Amendment to the United States Constitution and Article 1, Section 18 of the Nevada Constitution prohibited the

warrantless search. In this case, the apartment manager took it upon himself to enter the room rented by Mr. Gonzales and then let the police look inside. The manager had not been presented a valid search warrant. In fact, no search warrant was obtained until afer law enforcement officers gained a viewing of the room that was rented to Mr. Gonzales. At no time did Mr. Gonzales grant the manager the right to enter his unit or to allow the police to have a viewing of the contents of his unit.

The Fourth Amendment to the United States Constitution provides that the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and that no Warrants shall issue, but upon probable cause. Article I, Section 18 of the Nevada Constitution similarly provides, the right of the people to be secure in their persons, houses, papers and effects against unreasonable seizures and searches shall not be violated; and no warrant shall issue but on probable cause.

Under these cognate provisions of our federal and state constitutions, warrantless searches are per se unreasonable subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967); Hughes v. State, 116 Nev. 975, 979, 12 P.3d 948, 951 (2000).

There were no exigent circumstances. Mr. Gonzales was not at his unit of the motel. In fact, there was no one there when the manager decided to allow the police to look inside the unit. No consent was given by Mr. Gonzales.

Unreasonable searches and seizures are forbidden under the United States and Nevada Constitutions. And warrantless searches and seizures in a home are presumptively unreasonable. To contest a warrantless search of a home, however, one must have a reasonable expectation of privacy in the searched home. The home does not necessarily have to be the contestant's own to assert a privacy interest; even overnight guests can challenge a search. This was the home of Mr. Gonzales. *Peck v. State*, 116 Nev. 840, 846, 7 P.3d 470, 474 (2000); U.S. Const. amend. IV; Nev. Const. art. 1, § 18; Howe v. State, 112 Nev. 458, 463, 916 P.2d 153, 157 (1996).

The manager did not possess common authority over or other sufficient relationship to the premises or effects sought to be inspected to grant apparent authority to the police for a sneak peak into the life and property of Mr. Gonzales. *State v. Taylor*, 114 Nev. 1071, 1077, 968 P.2d 315, 320 (1998).

Mr. Gonzales had not abandoned his interest in the property in Number 114, it was his. Mr. Gonzales had a subjective and objective expectation of privacy in the place searched or items seized.

There was no actual authority to search available to the apartment manager. "Actual authority" to consent to a search is proved (1) where defendant and a third party have mutual use of and joint access to or control over the property at issue, or (2) where defendant assumes the risk that the third party might consent to a search of the property. U.S. Const. amend 4.

Whether an individual has "apparent authority" to consent to

a search must be judged against an objective standard, namely, would the facts available to the officer at that moment warrant a person of reasonable caution to believe that the consenting party had authority over the property. In this case, the police officer knew darn good and well that he was trampling over the Fourth Amendment rights of Mr. Gonzales by gaining a viewing of his unit from a manager that had no right to allow this type of entry. An officer should not act without further inquiry where the surrounding circumstances evince some degree of doubt in the mind of a reasonable person as to the consent-giver's authority to consent to a search. U.S. Const. amend. 4. *State v. Taylor*, 114 Nev. 1071, 1077, 968 P.2d 315, 320 (1998).

Counsel was ineffective for failing to litigate the suppression issues which were so flagrantly found in this fact setting. Suppression of the evidence in Room 114 would have removed the possession of a controlled substance charge, the possession of stolen property charge and would have defeated the burglary as the evidence tying Mr. Gonzales to the burglary would have been out of evidence. Counsel should have litigated this Fourth Amendment deprivation. Post-Conviction relief should be granted.

Ground Two: Inadequate investigation/ mental health issues; inability to formulate criminal intent:

An attorney must make reasonable investigation in preparation for trial, or make a reasonable decision not to investigate. Kirksey v. State, 112 Nev. 980, 923 P.2d 1102 (Nev. 1996). In this

case, reasonable investigation certainly included efforts to provide the court with evidence that the Petitioner was suffering from mental health issues at the time of the text messages, was outside of the area to actually act upon any threat and was not capable of formulating criminal intent.

Petitioner will testify that he suffered from mental health issues which he maintained by access to mental health experts and proper prescription medications for those mental health issues.

Petitioner suffered from mental health issues which were serious. Petitioner gave his friend the gun that was used in this shooting because Petitioner wanted to kill himself and intended to use the gun on himself. Petitioner was sent to Lake's Crossing. These evaluations demonstrated the mental health history of Petitioner. Further, Dr. Earl Nielson was retained to assist the defense case.

Petitioner will present this court with evidence from NMHI, treating psychiatrists, Earl Nielson, Ph.D., and Petitioner's family members concerning his inability to formulate intent to set out on a course of conduct to threaten or harass the victims of this case.

Competence shall be measured by the defendant's ability to understand the nature of the criminal charges and the nature and purpose of the court proceedings, and by his or her ability to aid and assist his or her counsel in the defense at any time during the proceedings with a reasonable degree of rational understanding. Calvin v. State, 122 Nev. 1178, 1182-83, 147 P.3d 1097, 1100

(2006); Dusky v. United States, 362 U.S. 402, 402 (1960); see NRS 178.400(2)(a)-c.

In Finger v. State, the Nevada Supreme stressed that to qualify as being legally insane, a defendant must be in a delusional state such that he cannot know or understand the nature and capacity of his act, or his delusion must be such that he cannot appreciate the wrongfulness of his act. In short, the ability to understand right from wrong under *M'Naghten* is directly linked to the nature of the defendant's delusional state. Finger v. State, 117 Nev. 548, 576, 27 P.3d 66, 85 (2001).

This is such a case. Mr. Gonzales was in such a state of mental health delusion that he could not formulate the intent to threaten or harass or even understand that he was texting messages of this type to the victims and that it would be a course of conduct to harass and annoy them.

If a jury finds that the State has failed to prove beyond a reasonable doubt that the defendant acted upon a course of conduct to threaten the victim, then the jury must find the defendant not guilty. Runion v. State, 116 Nev. 1041, 1050, 13 P.3d 52, 58 (2000).

No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his condition, but whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute a particular species or degree of crime, the fact of his intoxication may be taken into consideration in determining the purpose, motive

or intent. NRS 193.220. Mr. Gonzales believes that it was improper advice to advise him to accept three counts of Aggravated Stalking, when in fact NRS 200.575(3) was the proper statutory offense. He wishes to withdraw his plea and start the case over.

Ground Three: Invalid Guilty Plea issues:

Petitioner will testify that Mr. Cochran repeatedly advised him that he would receive habitual offender status and had the possibility of a life without or life prison sentence if he did not accept the plea to the three counts of aggravated stalking.

Petitioner was told prior to waiving preliminary hearing that if he did not do so he would face life without the possibility of parole.

Prior to recommending this plea offer, counsel did not discuss with Petitioner the ability to file a motion to suppress the items taken into evidence from Unit 114 of the Economy Lodge, nor did counsel discuss the right to sever the cases into separate trials, which would have been absolutely constitutionally mandatory in this setting.

Petitioner is entitled to withdraw his plea. Absent counsel's advice Mr. Gonzales would never have entered the guilty plea to three felony charges. Hill v. Lockhart, 474 U.S. 52 (1985) and Nollette v. State, 118 Nev. 341, 348-49, 46 P.3d 87, 92 (2002). Mr. Gonzales will testify that he was coerced by Mr. Cochran's threats of a severe ending on the case and would not have accepted the State's offer but instead would have proceeded to jury trial based upon a competency defense.

The case of Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986) stands for the proposition that the court will not invalidate a plea simply because the plea canvass is technically deficient as long as the record shows that the plea was knowing and voluntary. The Court must review the entire proceedings to determine whether this plea was coerced or was free and voluntary. The testimony of Mr. Gonzales and Mr. Cochran will be the key to this issue. Mr. Whomes would have been a necessary witness, but alas, he is unavailable. Mr. Gonzales seeks to withdraw his previously entered guilty pleas and proceed to jury trial.

Ground Four: Counsel was ineffective for failing to file a motion to sever the charges into two cases:

District courts must determine the risk of prejudice from a joint trial based on the facts of each case. A district court should grant a severance of a joint trial only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence. The district court's duty to consider the potential prejudice that may result from a joint trial does not end with the denial of a pretrial motion to sever; rather, the district court has a continuing duty at all stages of the trial to grant a severance if prejudice does appear. NRS 174.165(1).

The cumulative effect of adding burglary, possession of stolen property and possession of controlled substance charges into the trial of the aggravated stalking case was prejudicial to Mr.

Gonzales.

The stalking offenses are alleged to have occurred on or about January 10, 2014 through January 17, 2013. Those offenses were concluded by the time the allegations of the other property offenses were alleged. The alleged location of the victims at the time of the text messages was 4140 Rainbow Road, Winnemucca.

The burglary charge was alleged to have occurred on January 17, 2017, with a different victim and a different location, that of 4240 Park Place, Winnemucca. The burglary was alleged to have been committed with the intent to commit larceny from someone. No victim was named.

The possession of stolen property charge was alleged to have occurred at the Economy Inn, #114, Winnemucca, Nevada on January 17, 2013. The possession of a controlled substance, methamphetamine, was alleged to have occurred at Economy Inn, #114, Winnemucca, Nevada on January 17, 2013.

The offenses are certainly nowhere similar in place and time. The witnesses do not overlap. The issues do not overlap. The goal was to prejudice the Defendant in front of the jury with the additional charges all being lumped into one criminal case. Defense counsel was ineffective when defense counsel failed to file a motion to sever. By severing the charges into the property offenses versus the stalking offenses, Mr. Gonzales would have been able to defend the cases. A joint trial would compromise Mr. Gonzales right to a fair trial under the Fifth Amendment and would prevent the jury from making a reliable judgment about guilt or

innocence. Severance may be required where a failure to sever hinders a defendant's ability to prove his theory of the case. The cumulative effect of adding all of these unrelated charges to one trial was prejudicial to the defense. Severance was warranted. See *Chartier v. State*, 124 Nev. 760, 191 P.3d 1182 (2008).

Ground Five: Counsel was ineffective for failing to file pre-trial motions which would have resulted in the proper charge going forth, that of NRS 300.575(3).

This statutory scheme is one of enhancement. Various different factors increase the punishment and the category of the crime. Mr. Gonzales believes that his conduct, if criminal and if he was competent to have intended to text messages to these three victims, constituted a violation of NRS 200.575(3), a Category C felony.

The Nevada Supreme Court failed to review this issue on direct appeal but noted that the entry of the guilty plea on the aggravated stalking prevented the Court from determining whether Mr. Gonzales was truly guilty of committing violations of NRS 200.575(3).

NRS 200.575(1) defines stalking as willfully or maliciously engaging in a course of conduct that would cause, and actually does cause, a reasonable person to feel terrorized, frightened, intimidated or harassed. According to NRS 200.575(2), "[a] person who commits the crime of stalking and in conjunction therewith threatens the person with the intent to cause him to be placed in reasonable fear of death or substantial bodily harm commits the

crime of aggravated stalking."

The crime of aggravated stalking requires something more in that the defendant must not only engage in intentional (i.e., volitional) conduct that causes a specific result, but that the defendant must threaten with the intent to cause the victim to be placed in reasonable fear of death or substantial bodily harm. NRS 200.575(2)(a). The defendant must threaten the victim. He must willfully or maliciously engaging in a course of conduct that would cause and actually does cause, a reasonable person to feel terrorized, frightened, intimidated or harassed. In order to violate the statute, Mr. Gonzales must have been able to act willfully or maliciously during the time period of the course of conduct. He must have been competent and able to form intent. *Rossana v. State*, 113 Nev. 375, 383, 934 P.2d 1045, 1050 (1997). This is a specific intent crime. Mr. Gonzales could not form that type of intent due to his mental health breakdown. NRS 200.575(3) does not require specific intent. Counsel was ineffective for failing to file pre-trial motions to attack the charging document to get the proper charge against Mr. Gonzales from the onset of the case.

NRS 200.575(3) provides:

> A person who commits the crime of stalking with the use of an Internet or network site, electronic mail, text messaging or any other similar means of communication to publish, display or distribute information in a manner that substantially increases the risk of harm or violence to the victim shall be punished for a category C felony as provided in NRS 193.130.

The rule of lenity is a federal due process requirement. See *United States v. Lanier*, 520 U.S. 259, 266 (1997). The rule of

lenity requires that we liberally interpret an ambiguous criminal law in favor of the accused. *State v. Lucero*, 127 Nev. at ___, 249 P.3d 1226, 1230 (2011).

Trial counsel was ineffective under the Sixth and Fourteenth Amendments for failing to litigate the proper charge to its conclusion.

Ground Six: Counsel was ineffective at the sentencing stage of the case for failing to provide evidence of mitigation to the court.

This sentence was in excess of that needed for society's interests. The District Court's sentencing analysis was not 'reasoned' as the law requires and relied upon suspect evidence. Defense counsel failed to bring forth family members, mental health records, employer (Round Table Pizza), landlord, and others who would describe Mr. Gonzales as a decent person. The mental health issues took over and counsel failed to demonstrate the normal behavior of Mr. Gonzales. United States v. Rita, 551 U.S. 338, 127 S. Ct. 2456, 2468-69 (2007) and Gall v. United States, 128 S. Ct. 586 (2007). This Court should review the reasonableness of Mr. Gonzales's sentence. *See* United States v. Cantrell, 433 F.3d 1269, 1279 (9th Cir. 2006).

Sentencing schemes in Nevada are not blind to rehabilitative interests and the Court is required to consider the need for the sentence imposed to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. The Court should consider how to protect the public from further crimes of the defendant and

still provide the defendant with needed educational or vocational training and mental health treatment in the most effective manner.

A sentencing judge has discretion to consider a "wide, largely unlimited variety of information to insure that the punishment fits not only the crime. Three consecutive sentences on this case was extreme. Mr. Gonzales will serve over 15 years in prison prior to being eligible for parole. His action was that of a mentally ill drunk person, texts which were never intended to be so harmful to the victims. Text messaging is the nemesis of decent society. Hurtful comments are delivered without thought of consequence or interpretation. At least real phone calls allow the person receiving the contact to understand that person is 100 miles away and having a breakdown, not next door.

The district court's sentencing determination shall not rest upon impalpable or highly suspect evidence. Lloyd v. State, 94 Nev. 167, 576 P.2d 740 (1978); Silks v. State, 92 Nev. 91, 545 P.2d 1159 (1976). Failure to provide the District Court with accurate sentencing information amounted to reliance upon suspect evidence. Counsel was ineffective at sentencing.

The Federal and Nevada Constitutions provide that no person shall be deprived of life, liberty, or property without due process of law. U.S. Const. amend. XIV, § 1; Nev. Const. art. 1, § 8(5). In the federal system, a substantively reasonable sentence is one that is "sufficient, but not greater than necessary" to accomplish § 3553(a)(2)'s sentencing goals. 18 U.S.C. § 3553(a); *see, e.g.*, United States v. Vasquez-Landaver, 527 F.3d 798, 804-05 (9th Cir.

2008). The reasoning is the same herein. Application of NRS 200.575(3) would have netted Mr. Gonzales a better possibility of parole but at the down side, three 1-5 year prison terms. That is much more appropriate for the actions of Mr. Gonzales herein.

Ineffective assistance of counsel authority:

In State v. Love, 109 Nev. 1136, 865 P.2d 322 (1993), the Nevada Supreme Court reviewed the issue of whether or not a defendant had received ineffective assistance of counsel at trial in violation of the Sixth Amendment. The Nevada Supreme Court held that this question is a mixed question of law in fact and is subject to independent review. The Supreme Court reiterated the ruling of Strickland v. Washington, 466 U.S. 668 (1984). The Nevada Supreme Court indicated that the test on a claim of ineffective assistance of counsel is that of "reasonably effective assistance" as enunciated by the United States Supreme Court in Strickland. The Nevada Supreme Court revisited this issue in Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984) and Dawson v. State, 108 Nev. 112, 825 P.2d 593 (1992). The Nevada Supreme Court has provided a two-prong test in that the Defendant must show first that counsel's performance was deficient and second, that the Defendant was prejudiced by this deficiency.

The court went on in Warden v. Lischko, 90 Nev. 220, (1974), to hold that the standard of review of counsel's performance was whether the representation of counsel was of such low caliber as to reduce the trial to a sham, a farce or a pretense. Prejudice is demonstrated where counsel's errors were so severe that there was

a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability that, but for counsel's unprofessional errors the result of the proceeding would have been different, is a probability sufficient to undermine confidence in the outcome of the trial. Riley v. State, 110 Nev. 638, 878 P.2d 272 (1994). Petitioner seeks an evidentiary hearing on all issues raised in all post-conviction pleadings on file.

CONCLUSION

WHEREFORE, Petitioner prays that the Court grant Petitioner an evidentiary hearing on the issues raised herein and grant him the relief to which he may be entitled in this proceeding.

Dated this 10th day of May, 2017.

By: 

KARLA K. BUTKO, Esq.
P. O. Box 1249
Verdi, NV 89439
(775) 786-7118
State Bar No. 3307

CERTIFICATE OF SERVICE

Pursuant to NRCP 5, I certify that I am an employee of Karla K. Butko, 1030 Holcomb Avenue, Reno, NV 89502, and that on this date I caused the foregoing document to be delivered to all parties to this action by

X placing a true copy thereof in a sealed, stamped envelope with the United States Postal Service at Reno, Nevada.

_____ personal delivery

_____ Facsimile (FAX)

_____ Federal Express or other overnight delivery

_____ Reno/Carson Messenger Service

addressed as follows:

Kevin Pasquale, Esq.
Humboldt County District Attorney's Office
P. O. Box 909
Winnemucca, NV 89446

DATED this 10th day of May, 2017.

KARLA K. BUTKO

AFFIRMATION PURSUANT TO NRS 239B.030

The undersigned does hereby affirm that the preceding document does not contain the Social Security Number of any person.

DATED this 10th day of May, 2017.

KARLA K. BUTKO, ESQ.

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

Case No. CV 20,547

Dept. No. II

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF HUMBOLDT.

-oOo-

MELVIN LEROY GONZALES,

Petitioner,

RENEE BAKER, WARDEN, ELY STATE PRISON

Respondent.

_____/

STATE'S EVIDENTIARY HEARING BRIEF AND RESPONSE TO PETITIONER'S WRIT OF HABEAS CORPUS (POST CONVICTION)

COMES NOW, the State of Nevada, by and through Anthony R. Gordon, Humboldt County Deputy District Attorney, and hereby files this Evidentiary Brief and Response to the Petitioner's Supplemental Petition for Writ of Habeas Corpus (Post-Conviction). This Response is based upon the attached Points and Authorities and all the pleadings and papers on file herein.

Pursuant to NRS 239B.030, the undersigned hereby affirms this document does not contain the social security number of any person.

DATED this 4th day of October, 2018.

ANTHONY R. GORDON
Deputy District Attorney

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

POINTS AND AUTHORITIES

FACTS

On January 17, 2013, the Petitioner was arrested by the Humboldt County Sheriff's Office for aggravated stalking charges against his ex-wife, Connie Ramirez and her parents, who lived in Humboldt County, Nevada. Subsequently, on January 7, 2014, pursuant to a guilty plea agreement Petitioner entered pleas of guilty to three (3) counts of Aggravated Stalking, a Category B. Felony, in violation of NRS 200.575(2), and was thereafter sentenced on April 15, 2014, to three (3) consecutive terms of a minimum of sixty-two (62) months to one hundred fifty-six (156) months in the Nevada Department of Corrections.[1] The Nevada Supreme Court issued an Order of Affirmance in this case on November 12, 2014. Thereafter, the Petitioner filed a Writ of Habeas Corpus (Post-Conviction) on November 16, 2015, with the Respondent filing a response brief on May 12, 2016. The Petitioner subsequently filed a Supplemental Petition for Writ of Habeas Corpus (Post-Conviction) on May 15, 2017. Upon review of the relevant papers and pleadings herein, the Court ordered an evidentiary hearing in this matter on April 13, 2018. This Response is meant to supplement the State's previously filed response and legal arguments at the upcoming evidentiary hearing in this matter, and to clarify the issues in this case for the Court.

LEGAL ARGUMENT

This matter has now been set for an evidentiary hearing pursuant to *NRS 34.770*. Under *NRS 34.830(1)* this Court is required to dispose of a Writ of Habeas Corpus (Post Conviction), by an order containing specific findings of fact and conclusions of law supporting its decision, after which the Petitioner has been given the opportunity to invoke any method of discovery available to him under the Nevada Rules of Civil Procedure. (*See NRS 34.780*). Furthermore, under *Bolden v.*

[1] The factual basis herein comes from the Presentence Investigation Report dated February 4, 2014, and submitted to this Court by the Nevada Department of Public Safety. Parole and Probation Division.

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

State, 97 Nev 71, 73, 624 P.2d 20,21 (1981), a verdict will not be disturbed on appeal, where there is substantial evidence supporting a conviction.

As grounds for the Petitioner's Petition for Writ of Habeas Corpus (Post-Conviction), he pleads six (6) grounds of ineffective assistance of counsel under the 4th, 6th and 14th Amendments to the U.S. Constitution. All of the Petitioner's allegations are groundless and are not supported factually by the record or legally under relevant statutory and Federal and Nevada Constitutional law. As a result, the Petitioner's Original and Supplemental Writ of Habeas Corpus (Post-Conviction) must be denied in their entirety. For ease of reference, each substantive allegation will be dealt with individually as noted below.

I.

INEFFECTIVE ASSISTANCE OF COUNSEL (GROUNDS I-VI)

As noted above, the Petitioner alleges six (6) individual grounds of ineffective assistance of counsel in violation of his 6th and 14th Amendments to the U.S. Constitution. (*See Petitioner's Supplemental Petition for Writ of Habeas Corpus (Post-Conviction)*, pages 5-6). While the 6th Amendment to the United States Constitution guarantees effective assistance of counsel at trial, in order to establish a claim of ineffective assistance of counsel, the Petitioner must first show that counsel's performance fell beneath "an objective standard of reasonableness" *Strickland v. Washington*, 466 U.S. 668, 688 (1984). Only when the Petitioner has shown that counsel's performance fell beneath "an objective standard of reasonableness" and a deficiency therefore exists, the Petitioner must then show, but for his counsel's deficiency, a different result would have been had at trial. *Id* at 694; *Rubio v. State*, 124 Nev 1032, 1040, 194 P.3d 1224, 1229 (2008).

In *Oliver v. State*, 281 P.3d 1206 (Nev., 2009), the Nevada Supreme Court held that in order to state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a petitioner must demonstrate that his counsel's performance

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability that, but for counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial. *Hill v. Lockhart,* 474 U.S. 52, 57, 58–59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); *Kirksey v. State,* 112 Nev. 980, 978–88, 923 P.2d 1102, 1107 (1996). According to *Oliver, supra* at 1206, the court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one. *Strickland v. Washington,* 466 U.S. 668, 697, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

In order to establish an objective standard of reasonableness, the court must look to the "prevailing professional norms" of legal practice, *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (quoting *Strickland*, 466 U.S. at 688). Additionally, effectiveness does not mean errorless and courts have noted that effectiveness means performance "within the range of competence demanded of attorneys in criminal cases." *Jackson v. Warden, Nev. State Prison*, 91 Nev. 430, 43[2], 537 P,2d 473, 474 (1975) (quoting *McMann v. Richardson,* 397 U.S. 759, 771 (1970)). Courts have noted that effectiveness encompasses making "sufficient inquiry into the information that is pertinent" to the case in order to make "a reasonable strategy decision on how to proceed with a client's case." *See Doleman v, State*, 112 Nev. 843, 848, 921 P.2d 278, 280 (1996) (*citing Strickland*, 466 U.S. at 690-91). Furthermore, courts have held that strategic decisions made by trial counsel are assumed to be intentional and are "virtually unchallengeable." *Doleman,* 112 Nev. at 848, 921 P,2d at 280 (*quoting Howard v. State*, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990), strategic decisions based on an incomplete investigation are reasonable "precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland, supra* 466 U.S. at 690-91).

Secondarily, even if a petitioner can establish deficient performance of his trial counsel, he must then establish "prejudice" by a showing that counsel's errors were so serious as to

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

deprive the defendant of a fair trial, a trial whose result is reliable. (*Id.* at 687.) Proving prejudice requires the defendant to "show that there is a reasonable probability that, "but" for counsel's unprofessional errors, the result of the proceeding would have been different. In these situations, reasonable probability is defined as "a probability sufficient to undermine the confidence of the outcome" with a court hearing claims of ineffective assistance of counsel considering the totality of the evidence in determining prejudice. *Id.*

In *Morales v. State* (Nev., 2014) the court held that to prove ineffective assistance of appellate counsel a petitioner "must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that the omitted issue would have a reasonable probability of success on appeal," *citing Kirksey v. State,* 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996), *Morales, supra* at page 8. The *Morales* court further noted that "Appellate counsel is not required to raise every non-frivolous issue on appeal," *citing Jones v. Barnes,* 463 U.S. 745, 751 (1983), and that "[r]ather, appellate counsel will be most effective when every conceivable issue is not raised on appeal," *citing Ford v. State,* 105 Nev. 850, 853, 784 P.2d 951, 953 (1989), *Morales, supra* at page 8. Thirdly, the *Morales* court also noted that "[b]oth components of the inquiry must be shown," citing *Strickland v. Washington,* 466 U.S. 668, 697 (1984), and that they will "give deference to the court's factual findings if supported by substantial evidence and not clearly erroneous but review the court's application of the law to those facts de novo," *citing Lader v. Warden,* 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005), *Morales, supra* at page 9.

Finally, as to claims of ineffective assistance of trial counsel at the sentencing proceeding. according to the Nevada Supreme Court in *Oliver,* to state a claim of ineffective assistance of counsel sufficient to warrant a new sentencing hearing, a petitioner must demonstrate that his counsel's performance was deficient in that it fell below an objective standard of reasonableness,

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

and resulting prejudice such that there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different. *Oliver, supra* 281 P.3d at 1206, citing *Strickland v. Washington,* 466 U.S. at 694; and *Weaver v. Warden,* 107 Nev. 856, 858–59, 822 P.2d 112).

The Petitioner's first allegation of ineffective assistance of counsel, listed as ground 1, in his Supplemental Petition for Writ of Habeas Corpus (Post-Conviction), was that his trial counsel failed to adequately prepare and investigate the Petitioner's case by failing to prepare pre-trial motions to suppress property located at the Economy Inn, Room #114, in Winnemucca, Nevada. *(See Petitioner's Supplemental Petition for Writ of Habeas Corpus (Post-Conviction), page 6-9).* However, besides the fact that the entry of a guilty plea generally waives any right to appeal from the events occurring prior to the entry of the guilty plea under Webb v. State, 91 Nev. 469, 538 P.2d 164 (1975), the above case law is clear that the decision on whether to actually challenge the search warrant, or when to actually do so, and on what motions to file in a case, are strategic decisions made by trial counsel, and are assumed to be intentional and are "virtually unchallengeable," under *Doleman, supra* 112 Nev. at 848, 921 P,2d at 280 (quoting *Howard v. State*, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990). In this case, the Petitioner plead guilty, thus alleviating any decision of his trial counsel to eventually challenge the initial view of his room by law enforcement, which any success on in not at all certain, since this case has issues of both standing, as to whether Petitioner had a "reasonable expectation of privacy" in his hotel room, and whether the hotel manager had apparent authority to enter the hotel room without the Petitioner's consent. (*See State v. Taylor*, 114 Nev. 1071, 968 P.2d 315 (1998).

According to the well-known and respected treatise on search and seizure law where an earlier edition was cited for support by the Court in *Brendlin*, 6 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, Sec 11.3(e) at p.243, (5th ed. 2012 and Supp.

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

2013-2014), LaFave, citing *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), noted that "When a question is raised as to whether a particular person has standing to object regarding the search of a certain vehicle, once again the fundamental inquiry is whether the search intruded upon that person's 'reasonable expectation of freedom from governmental intrusion.'" *(See also, Rakas v. Illinois*, 439 U.S. 128 (1978) where a lack of standing was found as to the occupants of a vehicle who were ordered out of the car where incriminating evidence was later found, in light of the fact that the passengers did not assert any ownership or possessory interest in either the car, nor the illicit evidence recovered within the vehicle. As a result, since any successful challenge to the search in this case was at least questionable, it was entirely reasonable that a strategy decision be made by his trial counsel to not directly change the search under *Doleman, supra.* Therefore, as a result, Petitioner's first allegation of ineffective assistance of counsel lacks merit.

The Petitioner's second allegation of ineffective assistance of counsel, listed as ground 2, in his Supplemental Petition for Writ of Habeas Corpus (Post-Conviction), was that his trial counsel failed to adequately prepare and investigate the Petitioner's mental health issues, mainly failing to conduct a reasonable investigation to provide the Court with evidence that the Petitioner was suffering from mental health issues at the time that he sent the text messages in this case. *(See Petitioner's Supplemental Petition for Writ of Habeas Corpus (Post-Conviction), page 6-12).*

In this case, the Petitioner plead guilty negating the possibility that he could have raised a lack of intent issue at trial, which any decision to raise this issue would have been a trial strategy decision "virtually unchallengeable" under *Doleman, supra* 112 Nev. at 848, 921 P.2d at 280 (*quoting Howard v. State*, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990), strategic decisions based on an incomplete investigation are reasonable "precisely to the extent

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

that reasonable professional judgments support the limitations on investigation." *Strickland, supra* 466 U.S. at 690-91). As noted above, courts have noted that effectiveness encompasses making "sufficient inquiry into the information that is pertinent" to the case in order to make "a reasonable strategy decision on how to proceed with a client's case." *See Doleman v, State*, 112 Nev. 843, 848, 921 P.2d 278, 280 (1996) (*citing Strickland*, 466 U.S. at 690-91).

Furthermore, the Petitioner has failed meet the second prong of *Strickland, supra*, by establishing "prejudice" by a showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *(Strickland, supra, 466 U.S at 687.)* As a result, Petitioner's second supplemental allegation of ineffective assistance of counsel is groundless since Petitioner's decision to plead guilty negated any tactical trail strategy decisions that would have been made if the case had proceeded to trial.

The Petitioner's third allegation of ineffective assistance of counsel, listed as ground 3, in his Supplemental Petition for Writ of Habeas Corpus (Post-Conviction), is that he plead guilty because he was coerced into it by his trial counsel. *(See Petitioner's Supplemental Petition for Writ of Habeas Corpus (Post-Conviction), page 12-13).* In the present case, the Petitioner seeks a withdrawal of his guilty plea after sentencing, as compared to before, where the burden is higher in order to do so. Under *Molina v. State*, 120 Nev. 185, 87 P.3d 533,(2004), it was noted that Nevada courts "apply a more relaxed standard to presentence motions to withdraw guilty pleas than to post-sentencing motions," *Molina, supra* 120 Nev. at 191, 87 P.3d at 537, the Court in *Molina* noted that "guilty pleas are presumptively valid, especially when entered on advice of counsel." *Id.* At 190, 87 P.3d at 537. Furthermore, under *Stevenson v. State*, 131 Nev. Adv. Op. 61, 354 P.3d 1277, 1281 (2015), the Court noted that the "district court must consider the totality of circumstances to determine whether permitting withdraw of a guilty plea before sentencing would be just and fair." Previously, under *Bryant v. State,* 102 Nev 268, 721 P.2d 364, (1986),

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

the Nevada Supreme Court noted that the trial court must "review the entire record to determine whether the plea was valid, either by reason of the plea canvass itself or under a totality of the circumstances approach. See *Bryant, supra* 102 Nev at 272, 721 P.2d at 368. (*Bryant* superseded by statute on other grounds as noted in *Hart v. State*, 116 Nev. 558, 562, 1 P.3d 969, 971 (2000).

In *Stevenson, supra,* the Nevada Supreme Court noted that time constraints and pressure from interested parties exist in every criminal case, and that from the record there, there was no indication that their presence prevented the defendant from making a voluntary and intelligent choice among the options. *Stevenson, supra* at 354 P.3d at 1282-83. (*See also, Doe v. Woodford,* 508 F.3d 563, 570 (9th Cir.2007)(Test for determining whether a plea is valid is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant). In the present case, in reviewing the totality of the sentencing transcript in this case, it is clear that Petitioner knew the consequences of his plea and that the plea was voluntarily and intelligently made under *Stevenson, supra.* As a result, Petitioner's third allegation of ineffective assistance of counsel lacks merit.

The Petitioner's fourth allegation of ineffective assistance of counsel, listed as ground 4, in his Supplemental Petition for Writ of Habeas Corpus (Post-Conviction), was that his trial counsel failed to file a motion to sever his case into two cases. *(See Petitioner's Supplemental Petition for Writ of Habeas Corpus (Post-Conviction), page 13-15).* This contention lacks merit because under NRS 174.155, joinder is discretionary, not mandatory, and any decision to do would be a trial strategy decision "virtually unchallengeable" under *Doleman, supra.* As a result, Petitioner's fourth allegation of ineffective assistance of counsel lacks merit as well.

The Petitioner's fifth allegation of ineffective assistance of counsel, listed as ground 5, in his Supplemental Petition for Writ of Habeas Corpus (Post-Conviction), was that his trial counsel was ineffective for failing to file pre-trial motions that would have resulted in the proper charge,

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

NRS 200.575(3) (texting), a Category C Felony, instead of the crime he plead guilty to, Aggravated Stalking, a Category B Felony in violation of NRS 200.575(2). *(See Petitioner's Supplemental Petition for Writ of Habeas Corpus (Post-Conviction), page 15-17).* This contention again lacks merit because, as noted above, any decision to file such a motion would be part of a trial strategy and "virtually unchallengeable" under *Doleman, supra.* As a result, Petitioner's fifth allegation of ineffective assistance of counsel lacks merit.

The Petitioner's sixth and final allegation of ineffective assistance of counsel, listed as ground 6, in his Supplemental Petition for Writ of Habeas Corpus (Post-Conviction), was that his trial counsel was ineffective at sentencing for failing to provide mitigation evidence to the court. *(See Petitioner's Supplemental Petition for Writ of Habeas Corpus (Post-Conviction), page 17-19).*

As noted above, as to claims of ineffective assistance of trial counsel at the sentencing proceeding, the Nevada Supreme Court in *Oliver,* supra noted that to state a claim of ineffective assistance of counsel sufficient to warrant a new sentencing hearing, a petitioner must demonstrate that his counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different. *Oliver, supra,* 281 P.3d at 1206, citing *Strickland v. Washington,* 466 U.S. at 694; and *Weaver v. Warden,* 107 Nev. 856, 858–59, 822 P.2d 112). Additionally, there is no indication in the record here but for counsel's errors, the outcome of the sentencing proceedings would have been different. *Oliver, supra.* Furthermore, in *McNelton v. State*, 115 Nev. 396, 990 P.2d 1263, (1999), the Nevada Supreme Court held that what mitigation evidence to introduce at trial is a tactical decision, and this rational would hold true at sentencing, since what evidence a defendant may put forth before the Court, such as his mental health history, may expose a defendant to further

aggravating evidence. *See Cullen v. Pinholster*, 563 U.S. 170 (2011). Essentially, in the present case, what evidence or testimony to put forth before the sentencing court would fall under the realm of reasonable strategy decisions on how to proceed with a client's case under *Doleman*, supra. As a result, Petitioner's sixth and final supplemental allegation lacks merit and must fail well.

CONCLUSION

Based on the above legal arguments and all facts and pleadings herein, the Petitioner has failed on all of his allegations of Nevada Statutory and U.S. Constitutional error alleged in his Original and Supplemental Petitions for Writ of Habeas Corpus (Post-Conviction). Accordingly, it is respectfully requested that this Court deny the Petitioner's Original and Supplemental Petitions for Writ of Habeas Corpus (Post-Conviction) in their entirety.

DATED this 4th day of October, 2018.

ANTHONY R. GORDON
Deputy District Attorney

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b) I certify that I am an employee of the Humboldt County District Attorney's Office, and that on the 4 day of October, 2018, I delivered a copy of the **STATE'S EVIDENTIARY HEARING BRIEF AND PETITIONER'S RESPONSE TO PETITIONER'S SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS (POST-CONVICTION)** to:

MELVIN LEROY GONZALES #1018769
Lovelock Correctional Center
1200 Prison Road
Lovelock, NV 89419

KARLA K. BUTKO, ESQ.
1030 Holcomb Ave.
Reno, Nevada 89502

ADAM PAUL LAXALT
Nevada Attorney General
100 N. Carson Street
Carson City, NV 89701

(X) U.S. Mail
( ) Certified Mail
( ) Hand-delivered
( ) Placed in DCT Box
( ) Via Facsimile

IN THE SIXTH JUDICIAL DISTRICT COURT

OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF HUMBOLDT,

BEFORE THE HONORABLE MICHAEL MONTERO, DISTRICT JUDGE

-oOo-

MELVIN LEROY GONZALES,

Petitioner,

V.

RENEE BAKER, WARDEN,
ELY STATE PRISON,

Respondent.
_____/

Case No. CV 20,547

Dept. No. II

Transcript of Proceedings

Evidentiary Hearing

October 4, 2018

Winnemucca, Nevada

Transcribed By: Julie Rowan - (775) 745-2327

APPEARANCES

For the Petitioner: Karla Butko, Esq.
Attorney at Law
1030 Holcomb Avenue
Reno, NV 89502

For the Respondent: Anthony Gordon, Esq.
Humboldt County District Attorney's Office
P.O. Box 909
Winnemucca, NV 89445

-oOo-

INDEX

WITNESSES ON BEHALF OF THE PETITIONER:	Page
ELIZABETH HILL	
Direct by Ms. Butko.....	8
Cross by Mr. Gordon.....	12
Redirect by Ms. Butko.....	16
Recross by Mr. Gordon.....	18
Witness excused.....	18
DAVE WALLS	
Direct by Ms. Butko.....	20
Cross by Mr. Gordon.....	27
Redirect by Ms. Butko.....	33
Recross by Mr. Gordon.....	33
Witness excused.....	34
STEVEN COCHRAN	
Direct by Ms. Butko.....	35
Cross by Mr. Gordon.....	58
Redirect by Ms. Butko.....	68
Witness excused.....	70
MELVIN LEROY GONZALES	
Direct by Ms. Butko.....	72
Cross by Mr. Gordon.....	81
Witness excused.....	90

INDEX (Continued)

WITNESSES ON BEHALF OF THE RESPONDENT:

None

EXHIBITS:		Marked	Admitted
PX-1	Guilty Plea Agreement	38	39
PX-2	Fast Track Statement	55	56

THE COURT: This is in Case CV 20,547, case caption, Melvin LeRoy Gonzales, Petitioner, versus Renee Baker, Warden, Ely State Prison, Respondent. The record today will reflect the presence of the Petitioner, Mr. Gonzales --

Good afternoon.

THE PETITIONER: Good afternoon.

THE COURT: -- with counsel, Ms. Karla Butko. Mr. Anthony Gordon on behalf of the State. This matter comes before the Court on a hearing -- for a hearing on the Petitioner's post-conviction writ of habeas corpus. Counsel has had some conversations with the Court in chambers, and I'd like to play some of that on the record at this time. And if there have been any further discussions, please advise the Court.

Ms. Butko.

MS. BUTKO: Thank you, Your Honor. We are prepared to proceed to the hearing today with one exception. The Petitioner would move to amend to add ground 7 as an allegation to his supplemental petition. In the final review, receiving the presentence report today, an issue was discovered by me that needs to go forward to hearing. And it's my expectation to be able to put up the evidence concerning that claim, but I would like the opportunity to supplement the issue for

the Court.

And the issue is on a breach of the plea bargain, which occurred when the State argued that the Court should concur with the recommendation of the Department of Parole -- Parole and Probation. And that recommendation flew in the face of the guilty plea agreement and the terms of the plea. And so I'm going to ask for the ability to move to amend to add ground 7, which is that defense counsel was ineffective when he failed to object to the breach of the plea bargain by the State and that appellate counsel was ineffective when appellate counsel failed to raise the breach of the plea bargain on direct appeal.

And I do have Mr. Cochran here so I intend to ask those questions today, and hopefully, that way we can just get you the law that goes with the breach of the plea bargain.

THE COURT: Thank you, counsel. So there's been an oral motion to amend the post-conviction writ of habeas corpus by supplementing with an additional ground 7.

Mr. Gordon.

MR. GORDON: Your Honor, the State will have no objection to the amendment as long as we have the ability to brief it, and we have no objection for the

Court to hear the testimony on that issue today.

THE COURT: Very well. Hearing then no objection, the Court will grant the oral motion to amend the post-conviction writ of habeas corpus for the addition of a seventh grounds for relief. I would ask that that be a written supplement following today's evidentiary hearing, which will also allow the State an opportunity to file a response to that before the Court issues a ruling. Thank you.

With that, Ms. Butko, any further issues to address before you call your first witness?

MS. BUTKO: I would invoke the rule of exclusion.

THE COURT: Okay. The rule of exclusion has been invoked. So those of you who are here today as witnesses, you'll have to wait out in the hall until you're called to testify. Please do not discuss the case amongst yourselves. And we will notify you as soon as you're called as a witness, thank you.

MS. BUTKO: Officer Hill will be first, so.

THE COURT: Okay. Be the first witness?

MS. BUTKO: Yes.

THE COURT: So don't leave, okay. Okay, very good. Officer Hill, if you'll come forward. Can I go ahead and place her under oath?

MS. BUTKO: If you'll just let me put on the record that Mr. Gonzales and I have discussed the fact that his communications with Mr. Cochran are waived in order to proceed today, and he's willing to waive those confidential communications and proceeding.

THE COURT: Thank you very much. And Mr. Gonzales, do you understand that?

THE PETITIONER: Yes.

THE COURT: And that is your agreement with counsel today?

THE PETITIONER: Yes, sir.

THE COURT: Okay. Thank you. Okay, Officer Hill, you can come forward. If you'll raise your right hand and face the clerk, the clerk will administer the oath.

THE CLERK: You do solemnly swear the evidence you're about to give in the matter now pending before the Court today shall be the truth, the whole truth, and nothing but the truth so help you God?

MS. HILL: I do.

THE COURT: If you'll please come take the witness stand.

///

///

///

ELIZABETH HILL

(Sworn as a witness, testified as follows)

DIRECT EXAMINATION

BY MS. BUTKO:

Q. Could you please state your full name.

A. Elizabeth Hill.

Q. And what is your occupation?

A. Police officer with the Winnemucca Police Department.

Q. And what was your occupation in January of 2013?

A. Same, police officer with the Winnemucca Police Department.

Q. On January 17, 2013, did you have occasion to investigate a burglary case?

A. Yes.

Q. Do you recall the location of that investigation?

A. Park Place.

Q. Did you obtain a suspect regarding that burglary?

A. Yes.

Q. And who was the suspect?

A. Melvin Gonzales, Jr.

Q. Did you, ultimately, on January 17th, 2013, go to the Economy Inn?

A. Yes.

Q. Is that located here in Winnemucca?

A. Yes, ma'am.
Q. Why did you go to the Economy Inn on that date?
A. With Detective Walls who had obtained information that Melvin Gonzales was staying there.
Q. And would that be Dave Walls?
A. Yes.
Q. Did you determine which room Mr. Gonzales had rented at the Economy Inn?
A. Yes.
Q. What room was that?
A. 114, I believe is -- what is recorded in my notes.
Q. Was Mr. Gonzales present at the Economy Inn while you were there?
A. No.
Q. Did you check any records to see if Mr. Gonzales had paid the room fees or the rent for that room?
A. I did and obtained a copy of the rental agreement, the slip, whatever you would call it.
Q. Did you ultimately see into that room prior to the existence of a search warrant?
A. Yes.
Q. How did that occur?
A. The manager had opened the door, not at our request.
Q. And when the manager opened the door, what did you do?

A. We did a protective sweep, just a cursory sweep, make sure that there was no persons in there, stepped out, and re-secured the room.
Q. So at the time the protective sweep was done, there were no court orders for entrance into the room, correct?
A. Correct.
Q. And there were no people within that hotel room?
A. Correct.
Q. Okay. During your view at the protective sweep, did you see anything that you used later in your investigation?
A. Yes.
Q. What was that?
A. In plain sight were several items described by the victim that had been taken from their home in the burglary report.
Q. Were those items within the motel room?
A. Yes.
Q. Absent the manager opening the door, were those items visible from outside of the motel room with the door closed?
A. I do not recall, and the reason is there is a window there with curtains.
Q. And do you recall whether the curtains were open or

closed?
A. I do not recall.
Q. Did you ever get consent from Mr. Gonzales to enter room 114 at the Economy Inn that day?
A. No.
Q. Did you rely upon the actions of the manager in opening the door to enter?
A. No.
Q. What did you rely upon?
A. Can you -- will you back up and rephrase that sentence for me? I'm not sure where you're directing it.
Q. Okay. So when you entered that room at the Economy Inn, number 114, why did you enter it?
A. Initially, for a protective sweep to make sure that nobody was down in the room, or there wasn't somebody armed and dangerous.
Q. Had you knocked on the door before then?
A. Yes. And we were -- according to my report, we were -- all officers that were there were attempting to leave when the manager opened the door.
Q. And then when the manager opened the door, you went in?
A. Glanced in, did a quick protective sweep, like I said, to ensure that there were no persons there and

stepped back out.

Q. And during that glance is when you saw items you believed to be stolen property?

A. Correct.

MS. BUTKO: That's all I have, Your Honor.

THE COURT: Cross-examination, Mr. Gordon.

MR. GORDON: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. GORDON:

Q. Officer Hill, do you remember the reason why the deputies went there?

A. Detective Walls, who was Deputy Walls at the time, had an active investigation going in regards to harassment and threats.

Q. And did you -- did you have a -- was there -- to your understanding, was there a -- at the time you went there, was there an identified victim or identified perpetrator of the threats, or was it still subject to investigation?

A. The person had been identified. The suspect of the threats had been identified as Melvin LeRoy Gonzales.

Q. As the one making the threats?

A. As the one making the threats, correct.

Q. And who was your understanding were the threats against?

A. That was not my investigation. I do not recall.
Q. Okay. And do you recall when you looked at the slip -- so you went -- when you went there, you initially -- did you go to the office, or did somebody go to the office beforehand, the hotel office?
A. I do not recall the exact events on what led us there or how we made contact with the manager. It's been five years ago.
Q. Okay. So did you see the slip about who was renting the place?
A. I did, and it is retained within my case file.
Q. Okay. And how many people were on it?
A. It was one, rented out to a Mike Jones with the abbreviated name LeRoy behind it.
Q. So it was a Mike Jones --
A. Was the name that it was rented out to, correct.
Q. Did you identify Mike Jones? Did you ever know -- there wasn't anybody there who identified themselves as a Mike Jones?
A. No. And I know that per my report, it specified in there that a photograph was provided to the manager, and they identified that person as the tenant in room 114. So that while it was registered under the name Mike Jones, that was, obviously, an alias because they recognized the picture as Melvin Gonzales --

Q. Okay.
A. -- so, of Melvin Gonzales.
Q. But did you know that when the officer opened the door or the manager opened the door? Well, I'm just trying to figure out what you had -- what was your understanding of who was in that -- who owned that hotel room or was -- resides there before you went in.
A. We knew that that room -- based off of the information that -- that Detective Walls was able to obtain, we knew that Melvin Gonzales, a man matching that description, was renting that room.
Q. Okay.
A. When there was no answer at the door, we were leaving when the manager acted upon his own regard and opened that door. That is why it is so heavily documented within my case report is because we did not ask him by any means to act as an agent of law enforcement and open that door for us. We were leaving.
Q. Okay. So he did that on his own accord?
A. Yes.
Q. Okay. And then what -- then after he opened the door is when you went in there and did a sweep?
A. A sweep, and in plain view, were items listed in a -- in a burglary report.
Q. Okay. Now, were you the one that went in there and

did the sweep?
A. Yes. According to my report, again, it was myself and Sergeant Lynn.
Q. Okay. And then how long would you say you were in there doing the sweep?
A. In and out, it's a small room, within a few seconds.
Q. Okay. And was that standard procedure to do the protective sweep?
A. Yes. So based off of knowledge, the prior history with the subject involved, we wanted to ensure that we did not have a suspect armed and dangerous maybe hiding in the room. We also --
Q. And what was -- and what was your understanding of Mr. Gonzales' background?
A. I was aware of the threats case, not in full detail, and the harassment that was going on. I was aware that a school in, I think, the Reno area, I want to say Lemmon Valley, had been put on a code yellow lockdown as a result of the threats and harassment that were coming from Mr. Gonzales towards a family member. So we were already aware that he had some cautions that we -- and precautions that we needed to take for our safety.
Q. Okay. And so it was your safety -- once the manager opened the door, you wanted to protect yourself and the other officers?

A. Yes.

MR. GORDON: I have no further questions, Your Honor.

THE COURT: Ms. Butko, further direct?

REDIRECT EXAMINATION

BY MS. BUTKO:

Q. Officer Hill, Mr. Gonzales was arrested that day, correct?

A. Correct.

Q. And he was not arrested at the Economy Inn?

A. He was arrested on unrelated charges.

Q. And where was he arrested?

A. I believe he was within a block of it and was arrested by Detective Walls.

Q. And so when you entered that room, you knew it to be empty, correct?

A. Yes. Well, had good reason to believe. Nobody had answered the door.

Q. And you saw -- heard no noise?

A. Correct.

Q. Was the TV on?

A. I don't recall.

Q. Okay. And you -- did you see any type of movement before you entered that room?

A. I don't recall.

Q. Who was the name of the manager who actually opened the door for you?
A. Jared Rogers.
Q. And is he actually the manager or the manager's son?
A. I believe the manager's son.
Q. And so do you know what his status as an employee at the Economy Inn was?
A. A family-managed business. So they all -- they all helped take care of the -- the property.
Q. And did you have any conversation with Jared Rogers prior to him just opening that door?
A. I'm -- I would assume yes, but the details of that I would not be able to recall.
Q. Did you ask Mr. Rogers if he had Mr. Gonzales' consent to allow people in and out of Mr. Gonzales' room?
A. No, but I know that that was described to him because he had offered to open the door, and we told him no.
Q. So the answer -- at the time you go into this room, you believe it to be rented by Melvin Gonzales, correct?
A. Correct.
Q. And you believe him to be living there, correct?
A. Yes.
Q. And you don't have the consent of Mr. Gonzales?

A. Correct.
Q. And you don't have a warrant?
A. Correct.
MS. BUTKO: That's all I have.
THE COURT: Mr. Gordon.

RECROSS-EXAMINATION

BY MR. GORDON:
Q. Officer Hill, did you -- did the manager offer to open the door for you before he went in?
A. He said he could open the door and check when there was no answer, and we told him no. So it wasn't -- we were -- like I said, he took it upon himself to open that door.
Q. And then in your career in law enforcement, how often do people when you knock on the door, they don't answer and they're actually home?
A. Very often.
MR. GORDON: I have no further questions, Your Honor.
THE COURT: Thank you, you may step down.
MS. BUTKO: Your Honor, I have no objection if we excuse this witness so she can go about her other duties.
THE COURT: Very good, thank you.
Mr. Gordon, do you have any need to request

Officer Hill's further presence?

MR. GORDON: No, Your Honor.

THE COURT: Okay. Officer Hill, you're excused.

MS. HILL: Okay -- sorry.

THE COURT: That's a grand exit.

MS. BUTKO: I would call Dave Walls, please.

THE COURT: Okay. Officer, would you mind telling Detective Walls that we're --

MS. HILL: Yes, I'll let him know.

THE COURT: Thank you. Good afternoon, sir, how are you?

MR. WALLS: Hi. Fine, thank you.

THE COURT: Good. If you'll raise your right hand, face the clerk, the clerk will administer the oath.

THE CLERK: You do solemnly swear that the evidence you're about to give now pending before this Court to be the truth, the whole truth, and nothing but the truth so help you God?

MR. WALLS: I do.

THE COURT: If you'll please come take the witness stand.

Ms. Butko, you may proceed.

MS. BUTKO: Thank you, Your Honor.

DAVE WALLS

(Sworn as a witness, testified as follows)

DIRECT EXAMINATION

BY MS. BUTKO:

Q. Could you please state your full name.

A. Dave Walls, W-A-L-L-S.

Q. And what is your occupation?

A. Deputy sheriff, investigator.

Q. How long have you been employed in that capacity?

A. Well, I retired and came back. Currently, about just under a year. Prior to that four years.

Q. Were you employed in January 2013 with the Humboldt County Sheriff's Office?

A. Yes.

Q. And did you have the same type of a job?

A. I was a parole deputy at that time.

Q. Did you investigate a case involving a Defendant named Melvin Gonzales?

A. Yes.

Q. Do you recall the basics of that case?

A. I do.

Q. Do you see Mr. Gonzales in court today?

A. I do.

Q. And where is he seated?

A. He's seated at the defendant's table wearing an

orange and white jumpsuit.
Q. In January, let's say the week of January 10, 2013, did you go to an address listed as 4140 Rainbow?
A. I believe it was January 17th, but yes.
Q. Okay. And why did you go to that location?
A. For a welfare check on the inhabitants of the home.
Q. Is that address in Humboldt County?
A. Yes.
Q. How far from the Economy Inn is it to 4140 Rainbow?
A. I would guess four to five miles.
Q. Now, who did you meet with at the Rainbow address?
A. It was Ossa and Richard Palette (phonetic).
Q. At the time you were there, was Melvin Gonzales at that 4140 Rainbow address?
A. No.
Q. Did you review telephone messages at that address?
A. I did eventually but not on that first visit. I had attempted to but wasn't able to, but at a later visit, I did.
Q. Okay. So sometime on January 17, 2013, you reviewed telephone messages on a telephone at 4140 Rainbow?
A. Yes. It would have been my second visit to the home. It was the same calendar day, but it was the beginning of my next shift.
Q. And were those voicemail messages or texts?

A. Both.
Q. Okay. Do you recall how many messages there were?
A. I don't. I would say over ten.
Q. And do you recall how many phones you reviewed?
A. At that point, one.
Q. Okay. Now, on those phones, were there hostile messages?
A. Yes.
Q. And were those accused of being made by Mr. Gonzales?
A. Yes.
Q. Was there any complaint by either Ossa or Richard Palette that Mr. Gonzales was at their home?
A. No.
Q. Was there any complaint that he was at any location physically where they were?
A. No.
Q. So their complaint was one of voicemail and texting threats, correct?
A. Correct.
Q. Did you listen to those voicemail messages?
A. I did.
Q. And did you keep them for evidence?
A. I did.
Q. On January 17, 2013, did you arrest Melvin Gonzales?

A. Yes.
Q. Where was he arrested at?
A. Near the intersection of 4th and Hanson Streets in Winnemucca.
Q. And was that before or after the Economy Inn -- oh, let's see. Let me -- let me take this a different approach.
Did you go to the Economy Inn on January 17, 2013?
A. Yes.
Q. What time did you go there?
A. I don't recall the time exactly. I -- it might be in my report. I don't recall, I'm sorry.
Q. Did you go there before Melvin Gonzales was arrested?
A. Yes.
Q. How far in time?
A. Oh, maybe ten minutes.
Q. Okay. Did you enter a hotel room at the Economy Inn on that date?
A. I did.
Q. What room number was it?
A. I want to say it was 114.
Q. Did you ultimately obtain a search warrant for that room?
A. I did not. I was not part of the search warrant

process.
Q. Did somebody obtain a search warrant that day?
A. I believe Officer Hill did of the Winnemucca Police Department.
Q. Did you assist in executing the search warrant?
A. I want to say no.
Q. Now, while you were at room 114 at the Economy Inn, did you ask the manager to open the door?
A. No.
Q. Did the manager open the door?
A. Yes.
Q. How did that happen?
A. Well, we were -- we had gone to the motel initially to -- to locate Mr. Gonzales, and there was no answer at the door so we were kind of regrouping, standing out in the middle of the parking lot trying to get a plan together to locate him. The manager, at some point during our conversation, walked over to the room, opened it, pushed the door open.
Q. And did Officer Hill then enter that room?
A. Yes.
Q. Did you enter the room?
A. I did.
Q. Why?
A. A protective sweep.

Q. Did you find anybody in the room?
A. No.
Q. Did you find anything else in the room?
A. We weren't searching for things. We were searching for Mr. Gonzales. Maybe Officer Hill would be better to testify to this. I believe she recognized property on the bed that was stolen property, which led to her applying for the search warrant.
Q. Were there other officers there as well?
A. Yes. I want to say Sergeant Morton from the PD, and there were a couple of County deputies there as well.
Q. Okay. So prior to you entering this room number 114, did somebody knock on the door?
A. Yes.
Q. Did you announce police presence?
A. Yes.
Q. Was there an answer on the -- anybody open that door?
A. No.
Q. Did you see any sight of movement inside the room?
A. No.
Q. Did you hear any noise that would indicate someone was in there?
A. No, not that I can remember. I mean, it was a long time ago but not that I can remember.

Q. And so you're preparing to leave when the motel manager just opens the door?
A. That's correct.
Q. And you enter?
A. Yes.
Q. Did you have a court order?
A. No.
Q. Did you have permission of Mr. Gonzales to enter the room?
A. No.
Q. Now, do you recall the name of the person who opened the door for you?
A. I -- I'm familiar with the family that was operating the motel at the time. It might have been Jared Rogers, but I'm a little fuzzy on that.
Q. And would that be a son of the actual operators?
A. I believe so, if I remember correctly.
Q. And did he use a pass key?
A. I don't know. I was stand -- we were standing far enough back. I didn't see how he opened the door. I just know he opened the door.
Q. Were you present when the Economy Inn person, potentially Jared Rogers, was shown a picture of Mr. Gonzales?
A. I know that was done. I don't recall if I was

actually present or not.
Q. But at the time you were at room 114, you believe that room to be rented by Mr. Gonzales, correct?
A. Yes.
Q. Okay.
MS. BUTKO: One moment, Your Honor.
THE COURT: You may.
MS. BUTKO: I think that's all I have, Your Honor.
THE COURT: Thank you. Mr. Gordon, cross.
MR. GORDON: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. GORDON:
Q. Deputy Walls, what was the crime in which you went over to the Palette's house for?
A. To the Rainbow address?
Q. Yes.
A. Well, initially it was just a welfare check. As we receive more -- I -- so it was a welfare check. We confirmed they were okay. I pulled a case number, did an informational report. And then after my shift ended that day and I came back to work, the -- on the same calendar day, that evening I learned that this, for lack of a better way to put it, kind of grew legs, and we had a case.

Q. Well, do you know why you did a welfare check though on them?
A. Yes. The reporting party, Connie Ramirez, was --
MS. BUTKO: Your Honor, I'm going to object to hearsay.
MR. GORDON: Your Honor, I think he can testify, not for the truth of the matter asserted, why he went over there in the first place and did the welfare check.
THE COURT: I'll allow it, overruled. You may proceed.
THE WITNESS: Thank you. The reporting party, Connie Ramirez, had called dispatch. She stated she was at her work bus stop. That was about 3:30, 3:40 a.m. And she had relayed to dispatch that they had all been receiving threatening texts and phone calls from Mr. Gonzales, and she had tried to call her parents to get in touch with them, see how -- you know, make sure they were okay, and she couldn't reach them by telephone so she requested the deputies respond to the home and check their welfare.
BY MR. GORDON:
Q. And where was Mrs. Ramirez at?
A. She reported to dispatch that she was at the Hycroft bus stop.

Q. And then so when you went over there, you went over there and then you went to try to find Mr. Gonzales?
A. Yes.
Q. Okay. And then --
A. Well, I'm sorry. At which point?
Q. Well, after -- after you initially did the welfare check, it was at that time where you looked at the phone, or did you look at the phone?
A. Well, I attempted to look at Mr. Palette's phone and was unable to recover anything off of it and -- and so I filed an informational report at the end of that shift. But for the remainder of that shift, from the time we left the -- the -- the home on Rainbow Road until the end of shift, we were not looking for Mr. Gonzales at that point.
Q. Okay. Then how much time later -- how did you end up going over to Economy Inn?
A. Twelve hours later, I came back for my night shift, which started at 7 o'clock p.m., and I was briefed by -- by day shift deputies of what had developed during the day while I was asleep, and that prompted me to attempt to locate Mr. Gonzales.
Q. Okay. So when you went over to the -- the hotel, did you -- who was the one that made the contact with the office manager? Was it you, or was it somebody

else?
A. I'm a little fuzzy on that, but Deputy Darlington, I believe -- there's a supplemental report in the case file that Deputy Darlington had talked to motel management and to ascertain how many days Mr. Gonzales had been staying there.
Q. Okay. And what was the -- what time did you end up getting over at the hotel?
A. Obviously, after 7:00 because that's when my shift started, probably closer to 8:00.
Q. Okay. And do you remember, was it nighttime out?
A. It was.
Q. Okay. So it was dark out?
A. Definitely.
Q. And so when you -- who was the one that knocked on the door?
A. I can't say for certain. There were -- there was three of us up at the door. It could have been me. It could have been the PD. I just don't remember.
Q. So you -- did you -- who announced the presence of law enforcement? Did you do -- did you do it; do you remember?
A. I don't. I know someone did because that's how we do it. We -- I mean, --
Q. Okay. So is it --

A. -- that's how I do it.
Q. Is it based on your experience that sometimes when you're looking for somebody and they did something wrong, that they won't answer the phone -- the door?
A. Sure.
Q. Okay. So then you went there after Mr. -- there wasn't an answer at the door. You went to the middle of the parking lot to regroup?
A. Yes.
Q. Okay. And then at that point, is that -- is that where you saw the manager go over to the door?
A. Yes.
Q. Okay. And then did anybody -- was anybody with him when he did that?
A. No.
Q. And then he -- so you recall your -- he just opened the door and swung it open?
A. Yes.
Q. Did he say anything to you?
A. No.
Q. And then what happened then after the door was swung open?
A. After the door was swung open, I believe Officer Hill said that looks like the stolen property I'm looking for, because she could see through the open door

onto the bed, and we decided to clear the room.
Q. Okay. And -- so you went over there just to clear -- you went in there to clear it for your what, a protective sweep?
A. A protective sweep because at that point I -- I felt like I had probable cause to arrest Mr. Gonzales for -- for the stalking allegations. And if he was in there, he would have been arrested.
Q. And this was for a felony?
A. Yes.
Q. And then how long were you in the room doing the protective sweep?
A. I can't say for sure how long. I mean, it would have been brief because it's a small motel room. We checked the bathroom and the shower to make sure no one was hiding in there.
Q. And then was the room secured at that point prior to the warrant?
A. Secured, what --
Q. I mean, did you close the door and then just -- and then that's when Mrs. Hill -- Officer Hill started the warrant process?
A. Yeah, I don't recall if the door was closed, but I know that -- that officers had eyes on it.
Q. Okay. But no one was in there searching for

anything?
A. Correct.
Q. All right.
MR. GORDON: I have no further questions, Your Honor.
THE COURT: Ms. Butko.
MS. BUTKO: Very briefly.

REDIRECT EXAMINATION

BY MS. BUTKO:
Q. Do you know if the key for room 114 was actually on Mr. Gonzales' person when he was arrested?
A. That's what is reflected in my report, so yes.
Q. And then Mr. Gonzales was arrested within what, ten minutes of that protective sweep of that room?
A. Thereabouts. It was all -- if the right word I'm looking for is contemporaneously, you know, with that situation, it was within 10 or 15 minutes.
MS. BUTKO: That's all I have, Your Honor.
THE COURT: Mr. Gordon.

RECROSS-EXAMINATION

BY MR. GORDON:
Q. But when you -- when you went over there originally, he wasn't -- your understanding is he wasn't under arrest yet when you went to the hotel?
A. Correct.

Q. Okay.

MR. GORDON: I have no further questions, Your Honor.

THE COURT: Thank you, you may step down.

MR. WALLS: Thank you.

MS. BUTKO: Your Honor, I don't have an objection to allowing the detective to go back to work.

THE COURT: Okay. Mr. Gordon any need to recall --

MR. GORDON: No, Your Honor.

THE COURT: -- Detective Walls?

Okay, you're excused.

MR. WALLS: Thank you.

THE COURT: Thank you.

MS. BUTKO: The Petitioner would call Steve Cochran, please.

THE COURT: Okay. Detective Walls, do you know Mr. Cochran?

MR. WALLS: I do. I'll let him know.

THE COURT: Can you send him in, thank you.

MR. WALLS: Absolutely.

THE COURT: Mr. Cochran, good afternoon.

MR. COCHRAN: Good afternoon, Your Honor.

THE COURT: If you'll come forward and raise your right hand, the clerk will place you under oath.

THE CLERK: You do solemnly swear the evidence you're about to give today -- I'm sorry. Let me start again.

Do you solemnly swear that the evidence you're about to give in the matter now pending before the Court will be the truth, the whole truth, and nothing but the truth, so help you God?

MR. COCHRAN: I do.

THE COURT: Thank you. If you'll please come take the witness stand.

STEVEN COCHRAN

(Sworn as a witness, testified as follows)

DIRECT EXAMINATION

BY MS. BUTKO:

Q. Good afternoon.

A. Good afternoon.

Q. Could you please state your full name for the record?

A. Steven Wayne Cochran.

Q. And what is your occupation?

A. I'm an attorney.

Q. How long have you been an attorney?

A. Since 2004.

Q. Were you a licensed attorney in the State of Nevada in 2013?

A. I was.
Q. Were you a licensed attorney in the State of Nevada in 2014?
A. Yes.
Q. Did you represent an individual named Melvin Gonzales?
A. I did.
Q. Do you see him in court today?
A. I do.
Q. And where is he seated?
A. From my perspective, to your right in the orange and white.
Q. And do you recall the nature of the charges that you represented Mr. Gonzales for?
A. Yes. He had, I think, seven felony charges involving harassment or aggravated stalking, burglary, and maybe like possession of stolen items or -- something to that effect.
Q. Did Mr. Gonzales remain in the Humboldt County Jail while his case was pending?
A. Yes.
Q. Did the case end by way of a plea bargain?
A. Yes.
Q. Do you recall the basic nature of the plea bargain?
A. Yeah. I think he pled to three of those seven

felonies. The majority of them were dismissed, and I don't think there was -- I know he had six prior felonies, and so there was nothing -- habitual enhancement that was going to come at him.

Q. Was there any concession by the State as far as sentencing terms?

A. I believe the State was going to recommend or not -- something to the effect of concurrent sentences.

Q. For the three felonies that he was pleading to?

A. I believe so.

Q. And did he ultimately plead guilty to three counts of aggravated stalking?

A. I believe so.

Q. Did you anticipate that the case would end with three consecutive maximum sentences?

A. Any -- I mean, it's -- it was a possibility. I -- any time, anywhere within the statutory framework, it's always a possibility that someone could get the maximum and could get consecutive. So did I think it was possible, yes. I think that was the question.

Q. Did you talk to Mr. Gonzales and give him advice as to whether he should offer this -- accept this offer from the State to plead guilty to three aggravated stalking charges with the State not objecting to concurrent time?

A. Yeah, in general I will go over a proposed resolution or offer in terms of its potential advantages and disadvantages.

Q. Do you recall which deputy district attorney you were working with on the negotiations?

A. I do not.

Q. Do you recall how long Mr. Gonzales had been in custody before you came on to the case?

A. I don't know how long. I know I was not the first attorney. I think Mr. Stermitz had him, and I don't recall what the reason he withdrew off of was, but I -- I think he -- he spent over a year in custody before we got to the date of sentencing. But in terms of the breakdown between how long he was in custody before and after me, I'm not sure. I recall that there was a competency evaluation, and I know that can sometimes take some time depending on the level or competency of the person.

Q. Okay.

MS. BUTKO: Judge, may I approach?

THE COURT: You may.

MS. BUTKO: Ms. Clerk, may I have this marked as Petitioner's 1.

(Whereupon, Petitioner's Exhibit 1 marked)

MS. BUTKO: Thank you. May I approach?

THE COURT: You may.

BY MS. BUTKO:

Q. Mr. Cochran, I'm showing you what's been marked as Petitioner's Exhibit 1. This is a copy of the guilty plea agreement file-stamped in on January 7th, 2014.

Could you look at that document?

A. (Witness complies)

Q. Does it appear to be a true and accurate copy of the guilty plea agreement in this case?

A. I believe so.

Q. Is your signature also found on this document?

A. Yes.

Q. And would that be at page 10?

A. Yes.

MS. BUTKO: Your Honor, do you have a copy, or would you like a courtesy copy?

THE COURT: I have it.

MS. BUTKO: I would ask for admission of Petitioner's Exhibit 1, please.

THE COURT: Counsel.

MR. GORDON: I have no objection, Your Honor.

THE COURT: Hearing no objection, Petitioner's Exhibit 1 is admitted.

(Whereupon, Petitioner's Exhibit 1 admitted)

BY MS. BUTKO:

Q. Could you look at page 1, lines 23 to 26. Is the language in this guilty plea agreement consistent with the fact that the State would agree to recommend concurrent time on each count?

A. You've got on line 23 indication that both sides are free to argue at the time of sentencing, and then you have, subsequent to that, in lines 24 and 25 a limitation apparently or arguably on that aspect of being free to argue.

Q. And so that would mean that the State is free to argue for the maximum possible punishment under the 2 to 15 statute, correct, but that they would recommend that counts -- I don't know, was it 1, 2 and 3 it ultimately changed to, would run concurrent?

A. Possibly.

Q. Okay. And so did you advise Mr. Gonzales to accept this plea offer?

A. You know, I don't recall the exact specifics. Certainly, what I do recall was knowing that Mr. Gonzales qualified for the lifetime habitual enhancement, knowing that there were, I think, seven felony counts, and that there was a substantial likelihood that he could be convicted of just one of the seven counts to trigger the habitual criminality. I would imagine that the conclusion here, in addition, you

know, to, I guess, no claims or representations that he did not do the acts that was alleged, that the recommendation would have been to accept the deal.

Q. And once your client entered the plea consistent with the terms found in the guilty plea agreement, was your goal to enforce the plea bargain between Mr. Gonzales and the State?

A. The goal is, one, that; and, two, to hopefully make his exposure and the result the least bad it can be.

Q. Now, factually, concerning this case, was your understanding of the facts that Mr. Gonzales' actions that constituted the stalking charges were a voicemail and text messages left on telephones?

A. Yes. My recollection was that he left numerous messages threatening to slit the throats of children and their grandparents and his wife and things of that nature.

Q. Was there any allegation that you saw that he was actually physically at a location with Mr. Palette, Ossa Palette, or Connie Ramirez?

A. No. I believe the threat was that he was going to be at a location, find them, and cut their throats.

Q. And, in fact, was Mr. Gonzales even in the area those victims were at at the time the threats were made?

A. I don't know where he was when he made them, nor did

he represent to know where, but my understanding was that the statute would operate either based on the location of the perpetrator or the location of the recipient of the stalking.

Q. Wasn't your argument in the fast track statement one of jurisdiction, partially --

A. Correct.

Q. -- when you asked the Supreme Court to say there was no jurisdiction because the victims were in Winnemucca, but the text messages were made from Reno?

A. Yes.

Q. And wasn't your sentencing argument to this very Court that Mr. Gonzales didn't have the ability to act on these threats because he was a hundred miles away?

A. Yes. That was what was attempted to mitigate his course of action at sentencing.

Q. Now, let's talk about the Economy Inn, the charges of the burglary, possession of stolen property that were dismissed as part of the plea.

A. Okay.

Q. Did you review the facts concerning the police officers' protective sweep of room 114?

A. I believe so.

Q. Did you ever have a chance to speak with an individual named Jared Rogers?

A. I don't recall who that is.
Q. Did you have an opportunity to determine who actually opened the hotel room door so the officers could peek in?
A. My recollection was that there was a search warrant here.
Q. Okay. So there was a search warrant ultimately obtained after the police officers saw stolen property on the bed when they peered into the room because the manager opened the door.
A. Okay.
Q. Did you raise any sort of a motion to suppress?
A. I do not recall an issue of a motion to suppress occurring in this matter.
Q. Did you take any efforts to sever these cases?
A. There was -- I do not believe -- well, I don't recall.
Q. Okay. Would you agree, from a legal standpoint, the burglary, possession of stolen property, and possession of methamphetamine charges are different than the stalking charges?
A. Yes.
Q. Would you agree they occurred at a different location at a different time?
A. Yes.

Q. Is there some reason you didn't move to sever the cases?
A. Yeah, we didn't proceed to trial, and he pled the matter out.
Q. Okay. Now, in this particular case, there were competency evaluations ordered, correct?
A. Correct.
Q. Do you know if Mr. Gonzales was taking medications while he was at the jail?
A. Which jail? He's been in a lot of jails.
Q. Humboldt County Jail, I'm sorry.
A. I don't recall.
Q. Did you discuss with Mr. Gonzales his -- the effect those medications would have on him while he was in custody at the Humboldt Jail?
A. You know, I -- I didn't do the competency evaluation, a couple of doctors did. So I -- I didn't -- I wasn't part of the competency determination and inquiry into what he may have been taking before I was counsel of record.
Q. Well, I'm trying to go into the time you are counsel of record.
Did you visit Mr. Gonzales at the jail?
A. Yes.
Q. How often?

A. I do not recall.
Q. Did you see him on a regular basis?
A. See -- no. I mean, I would -- I would talk to him on the phone. I would visit him in person, but we didn't set up a regular schedule. It was to address matters as they would come up.
Q. So during your visits to the Humboldt County Jail when you saw Mr. Gonzales in person, did you see signs that he was taking medications?
A. You know, I -- I didn't, but it's not really my level of expertise to be a drug recognition expert.
Q. Did you see any signs that he was having difficulty understanding you?
A. No.
Q. Now, when you discussed the actual plea bargain with him, did you explain to him that this could mean 450 months in prison?
A. Yeah. When we discuss the matter, we generally talk about the exposure on all the charges, the exposure on the charges that would remain after the majority of them were dismissed. So, yeah, we -- we do math, and we add up not just the three he was charged with, but also the other four that were dismissed and then, of course, you know, the habitual enhancements.
Q. Now, when you discussed this plea with him,

Mr. Gonzales put in his petition that he plead guilty because he believed you told him he would get concurrent sentences.

Did you make that statement?

A. No. It's the discretion of the judge to order consecutive or concurrent, regardless of the plea bargain.

Q. Mr. Gonzales put in his petition that he pled guilty based upon the belief that he would get concurrent sentences and treatment as part of his sentence.

Do you recall having those discussions?

A. No. And what I do recall generally is -- is defendants, when they're canvassed, indicate whether they have been promised a particular sentence or not, and my recollection was I don't recall him saying that.

Q. Now, this particular statute, have you read NRS 200.575?

A. Is that the aggravated stalking one?

Q. Yes.

A. Yes, I have read it.

Q. And this particular statute has two different sections that a person could be prosecuted under, correct?

A. At least, yeah.

Q. So section 2 is the aggravated stalking that

Mr. Gonzales pled guilty to, the 2 to 15 penalties. But section 3 is a section which says a person who commits the crime of stalking with the use of the Internet, network, electronic mail, text messaging, or similar means of communication is actually guilty of a category C felony.

Do you recall that?

A. I do.

Q. Is there some reason you did not file a motion or writ this case to determine the correct statute which should apply to Mr. Gonzales?

A. Is there a reason, yes, because he chose to resolve it this way. And I guess there was a discussion in terms of should the matter proceed to trial in terms of lesser included offenses, that there could be the possibility that you could have an instruction to the category C as opposed to the 2 to 15 B, but in terms of a writ commensurate with a guilty plea, it didn't really make sense.

Q. So let me make sure that I'm understanding what you just said. He's facing seven felonies, correct?

A. Yes.

Q. Some of those could be subject to a motion to suppress for the drugs and the stolen property, correct?

A. I guess they could have. I wouldn't really see -- I

guess in general, motions to suppress when there's a search warrant aren't always the most successful but --
Q. But if the search warrant --
A. -- could have been --
Q. -- is based upon tainted evidence that was illegally obtained, that would be seeing the personal property in a room that was not opened for the police.
A. I think it would be kind of a stretch to assert that the motel manager became a state actor, and so I -- I just -- I don't see it.
Q. Okay. So your advice to Mr. Gonzales was take these three 2 to 15's because we get rid of some other felonies, we avoid habitual offender status even knowing that his actions constituted a violation of section 3, a category C felony, and that the case was overcharged?
A. I don't know that a jury would have made that conclusion. I thought that there was a possibility that of his seven charges, a jury could find him guilty of one, and that habitual enhancement could then -- could attach based on the probability of just one out of seven charges coming back as a guilty verdict.
Q. Did you have any evidence to support the fact that Mr. Gonzales' stalking offense included anything other than telephonic or texting?
A. I don't recall.

Q. Okay. Now, when you entered this plea for Mr. Gonzales, you ultimately end up doing an appeal, correct?
A. Yes, he requested an appeal.
Q. Did you retain the right to appeal any of the substantive issues of the case?
A. I believe jurisdiction is always reserved in that regard, so yes.
Q. Did you flush out the actual application of NRS 200.575(2) versus 3 by way of a preliminary hearing?
A. I do not believe I -- I don't recall being part of a preliminary hearing.
Q. And so the Supreme Court, in its order of affirmance, basically told you because he pled guilty to the aggravated sentence of 2 to 15 and that statute, we're not going to review whether or not his actions actually constituted a violation of that statute.
Do you recall that?
A. Roughly.
Q. So could you have retained the right to appeal which aspect of that sentence a -- applied to the facts of this case?
A. I mean, if -- if as part -- if Mr. Gonzales chose to reject the State's offer and make a counteroffer to that regard, we could have, but he could have been in the

position where the State rejected that, and he was then now left with going to trial on seven counts instead of the three that they offered. So, you know, he decided to accept it rather than reject it.

Q. So Mr. Gonzales enters into this contract with the State by entering his plea of guilty to three counts of aggravated stalking with the rules that the State can argue for the amount of time it wants, but it has to recommend concurrent sentences on the three charges, right?

A. Of -- there is language in the plea agreement to that effect.

Q. Okay. And then you get -- do you receive a copy of the presentence report prior to sentencing?

A. I'm sure I did.

Q. And did you note that in the presentence report the Department recommends that Count 1 and 2 run consecutively, but that Count 3 run concurrent to Counts 1 and 2?

A. Yes.

Q. And so coming into the sentencing hearing, you're aware that part of your battle is going well in that you want three concurrent sentences, and the Department's recommending two concurrent sentences, right?

A. One or two.

Q. Okay. So on the date of sentencing when the State does a lengthy argument about Mr. Gonzales' record, which is significant, it's a significant record, but then the State ends its sentencing recommendation for the Court with, Your Honor, I concur with the recommendation contained in the presentence investigation, did you object?

A. No.

Q. Why not?

A. I don't know what recommendation the State's talking about there.

Q. Okay. They said they concur with the recommendation contained in the presentence investigation.

A. There were numerous recommendations in the presentence investigation.

Q. Okay. Would you agree that paragraph 10 -- let me, in fact, show you a copy of the presentence report.

MS. BUTKO: Your Honor, I only have the one. I apologize.

BY MS. BUTKO:

Q. If I could show you section 10 where it says recommendations.

A. Okay.

Q. Could you look through the bottom of that page and the top of the next page?

A. (Witness complies)
Q. And is that the section where the Department of Parole and Probation gives a recommended sentence for the Court?
A. Which one?
Q. Section 10, Roman numeral 10.
A. Yes. There are -- there are numerous recommendations in there.
Q. Okay. And those recommendations are that Count 1 and 2 run consecutive but Count 3 run concurrent, correct?
A. Yes. That Count 3 run consecutive to the sentence imposed in Count 1 and concurrent with the sentence imposed in Count 2.
Q. And so you knew going into sentencing that the Department of Parole and Probation was not in agreement with the recommendation in the plea bargain, correct?
A. Yes. There -- probation and parole is not bound by the plea agreement.
Q. And so when the State of Nevada argues I concur with the recommendation contained in the presentence investigation, isn't that a breach of the plea bargain?
A. I guess you'd have to determine what the State, when they say recommendation, which recommendation they're talking about.

Q. Okay. So rather than splitting hairs on that subject, did you raise the breach of the plea bargain issue on direct appeal?
A. No.
Q. Why not?
A. In discussing the matter with Mr. Gonzales, that was not an aspect that I recall coming up in terms of what he wanted to appeal, nor did I see where the State specifically said something in direct contravention of the plea agreement.
Q. Now, Exhibit 1, the plea memo, says quote, unquote, the State agrees to recommend that the penalty on each count run concurrent to each other. Did the State ever recommend that during its argument?
A. Orally, perhaps not, but it seems in writing it's there in the plea agreement.
Q. So we know it's in the plea agreement, but the plea agreement obliges the State to stand up and say, Your Honor, we want the maximum, but we want the three counts to run concurrently, right?
A. I don't know if that obliges them to stand up and say that.
Q. Well, it says the State agrees to recommend that the penalty on each count run concurrent to each other. So that's different than the State agrees to not object to,

right?
A. I agree.
Q. That's an affirmative obligation, to recommend, right?
A. Yes.
Q. So when the State did not recommend that the counts run concurrent, did you object?
A. No.
Q. Did you argue that it was a breach of the plea bargain?
A. I did not.
Q. Did you seek specific performance of the plea bargain?
A. We did not.
Q. Okay.
MS. BUTKO: If I could have one moment, Your Honor, I just want to make sure I covered the other facts clearly.
BY MS. BUTKO:
Q. At the time the appeal was pending, did you have any contact with Mr. Gonzales at that point?
A. Yes. I believe --
Q. Do you recall discussing issues with Mr. Gonzales that would be raised on the appeal?
A. I don't know if I specifically recall, but, I mean,

as a general -- as a general matter, that's how the practice goes.

Q. Okay. And would you agree that on direct appeal, your issue was that the three counts are redundant and that there should be one sentence?

A. Yes.

Q. And the jurisdiction question of whether Mr. Gonzales, having made his comments in Washoe County, Humboldt County should not have prosecuted it?

A. Yes.

Q. Did you raise any other issues?

A. For some reason I -- I think there were three.

Q. Okay.

MS. BUTKO: May I approach, Your Honor?

THE COURT: You may.

MS. BUTKO: May I have this marked as Petitioner's 2.

(Whereupon, Petitioner's Exhibit 2 marked)

MS. BUTKO: Thank you.

BY MS. BUTKO:

Q. Mr. Cochran, would you look at Petitioner's 2 and tell me if you recognize it.

A. I do.

Q. And what is that?

A. It looks like the fast track statement on

Mr. Gonzales' behalf.

Q. Does it appear to be a true and accurate copy of your fast track statement?

A. Yes.

MS. BUTKO: Your Honor, I'd move for admission of Exhibit 2.

THE COURT: Mr. Gordon, any objection?

MR. GORDON: No, Your Honor.

THE COURT: Exhibit 2 is admitted.

(Whereupon, Petitioner's Exhibit 2 admitted)

MS. BUTKO: Your Honor, I did bring a courtesy copy if you'd like one.

THE COURT: Please, if you have, thanks.

BY MS. BUTKO:

Q. Mr. Cochran, let's take a look at Exhibit 2 and just go through the issues that are raised. So if we go to actually page 1 of the argument, at the top of the page, you indicate issues presented. Do the multiple convictions of appellant constitute redundant convictions, do you see that?

A. Yes.

Q. And then legal argument on the same page, your argument is only one conviction should stand, not three, correct?

A. Correct.

Q. And then if we go to page 6 of this document, you raise the question of jurisdiction. Well, actually let me rephrase. At the top of the page, you actually argue that 200.575, sub 3, applies not subsection 2.

Do you see that?

A. Yep.

Q. And is that the one the Supreme Court said because he pled guilty, we're not going to hear this issue?

A. Paraphrasing it, but, yeah, that's a rough approximation.

Q. And so if you had withheld the right to have that reviewed by the Supreme Court in your plea bargain, do you see your appeal ending differently?

A. I have no idea what the Supreme Court may -- or the Court of Appeals may have done.

Q. Okay. But you acknowledge that you believe Mr. Gonzales actually committed a category C felony, not the 2 to 15 felony, correct?

A. That was one of the angles we discussed in terms of what to pursue appellate-wise.

Q. And, ultimately, the Supreme Court affirmed the judgment of conviction as it stood, correct?

A. Yes.

MS. BUTKO: I believe that's all I have, Your Honor.

THE COURT: Thank you. Mr. Gordon, cross-examination.

MR. GORDON: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. GORDON:

Q. Mr. Cochran, you weren't entirely sure whether the State breached a plea agreement in this case?

A. Yeah, I mean, that's a legal question.

Q. And isn't it true that on State's -- or Defense -- Petitioner's Exhibit Number 1 on line 21, it said that -- excuse me, line 23, both sides are free to argue at sentencing?

A. It does.

Q. And then when Mr. Pasquale said -- stood up and said I recommend or I -- I -- I think the word is I concur with what P and P said, that doesn't necessarily mean to you that there was a breach?

A. I don't know what aspect -- you know, P and P says a lot of things, and they make multiple recommendations, and so when he says he concurs with the recommendation, singular, I don't know which one he necessarily -- what he's concurring with. Because certainly, he had the right to concur with the length of time that was recommended in the recommendation section, and that would have been allowable so it really came down to

somehow being able to know what Mr. Pasquale was concurring with.

Q. Okay. And that was -- was that an issue that you may have raised on appeal? Did you consider that; do you recall?

A. I do not recall talking about the breach of the plea agreement on appeal.

Q. Because you weren't really sure that the State actually breached it?

A. Yeah.

Q. So you -- and then in regards to your three issues, did you talk about those issues with Mr. Gonzales?

A. I believe so.

Q. And those are the ones that you believe that were -- that you had your best chance at prevailing?

A. Yeah. I mean, once the client indicates a desire to appeal, you know, there -- there is no avenue, and I'm not saying it was something I wanted to pursue here, but, you know, you have to pursue the appeal. You have to come up with a claim. There is no filing of a no merit appeal, essentially, in Nevada.

Q. And one of the issues that you raised was the issue of -- that Mr. Gonzales should have been charged or, essentially, what he did was just regular stalking under 200.575(3) instead of 200.575(2)(a), the aggravated

instead of the regular texting.

Was that a consideration in the appeal?

A. Can you rephrase your question? I'm not sure what you're asking me.

Q. Let me say -- let me ask you this. When you were negotiating this case, you indicated that one of the main factors was the habitual?

A. Yeah, he had six prior felonies.

Q. And so when you negotiated three, you felt that was a good offer from the State?

A. You know, I thought it was less bad.

Q. Based on the potential of what Mr. Gonzales could have faced if he got convicted on them?

A. Yes, just the notion of in light of the totality of circumstances and evidence here, the likelihood on this case of coming in and getting seven not guilty verdicts was, I thought, exceedingly low, and all it took was one finding of guilt and that habitual enhancement could have attached and leaving him in a much worse position than taking that entirely off the table with the plea agreement.

Q. And that was one of the things that you negotiated with Mr. Pasquale is that the State, whether it's Mr. Pasquale or Mr. Holmes, that the State would not file a habitual?

A. Yes.
Q. Did you consider as part of your -- well, let me ask you this. In this case, did you consider a lot of pretrial motions that you could have made?
A. Well, I mean, consider any of them if they are viable. I did not consider anything here to have been done that was not in good faith and without, essentially, a search warrant or an exception to the search warrant in the matter.
Q. Was the search warrant issued viable? Did you read it?
A. I did not see any Frank's issues with the search warrant.
Q. And you were aware of the issue of the manager had opened the door?
A. Yes.
Q. So that was considered prior to the plea?
A. Yes.
Q. Okay. And then also what about the issue of the severance?
A. Severance, you know, that comes about if you're going to go to trial. There's no point of severing counts that are being dismissed.
Q. So that wasn't a viable -- that may have been something that if you went to trial, you would have

considered that?
A. Absolutely.
Q. And then what about -- what about the issue that was raised in the writ about this was actually a -- as Petitioner indicated, a category C stalking as compared to the aggravated, was that considered?
A. Yeah, it was considered, and it really is of little consolation if a jury comes back and finds you guilty of the category C felony. You still have that exposure to the habitual.
Q. So in your -- so he was still looking at habitual even if he got the C felony?
A. That was the worst thing that could have been imposed on him in this case, and that was -- that and the four other felonies is what we avoided.
Q. And you would have -- I think your testimony was that if you had went to trial, you might have used the Schedule C as a -- as a lesser included?
A. Certainly. But, again, you know, to avoid the possibility, we would have had to win at everything. And even getting a verdict for, you know, a lesser didn't protect us the way the plea agreement did from the habitual enhancement.
Q. And that was the main --
A. That was the most severe thing that Mr. Gonzales was

possibly looking at.
Q. And you had discussed these issues with Mr. Gonzales?
A. Yes.
Q. And one of the -- on the -- on the State's Exhibit -- or excuse me, the Petitioner's Exhibit No. 1, the -- as to Counts 2 and 3, which you plead to in regards to the one victim was Ossa Palette, his former mother-in-law, and then the other one was Richard Palette, the former father-in-law, those were -- they resided in Humboldt County; is that correct?
A. I believe so.
Q. And your understanding is -- where was Connie Ramirez residing at the time there were threats?
A. I don't know if she had moved back in with her folks. I don't recall.
Q. But that was one of the issues that you raised; is that correct, on these -- or the locality of jurisdiction in regard --
A. Yes.
Q. So that was considered as a possible issue?
A. Yes.
Q. You didn't ultimately win on it, but you at least considered it; is that correct?
A. Correct.

Q. Now, the issue of mitigation in regards to sentencing, how did that -- how did you approach that, your sentencing argument?
A. Well, I think we talked about that earlier in terms of there was an emphasis on the actual proximity physically of Mr. Gonzales. I think there was discussion about the role that methamphetamine may have played in this as well. That's what I recall in terms --
Q. Did you raise -- do you recall raising those issues at sentencing?
A. You know, I don't necessarily recall it independently, but I know we talked about it on direct examination. And so I think that's where, you know, the memory of talking about his physical proximity comes from. It was kind of a trigger during direct examination.
Q. And you tried to mitigate the sentencing because of the proximity of the distance?
A. I tried to mitigate everything on this case to make it the least bad, similar to when you said, well, was it a good offer from the State? Well, it was less bad than what the evidence looked like it would turn out if we went to trial. So it was really about choosing your least bad options when you don't have the greatest of

options.
Q. And professionally, in your practice, you do that on all your cases?
A. Yeah. I want to do what -- what protects the client the best and exposes them to, hopefully, the least bad consequences. If it looks like, you know, that the likelihood of being found not guilty of the allegations is -- is low, but ultimately, it's the client's choice, not mine.
Q. And Mr. Gonzales was aware of all the factors in this case that he was -- what he was looking at versus what he was offered by the State?
A. Yeah. When you say "what he was looking at" by specifically the time ranges such as 2 to 15, things of that nature, yes, we -- you know, we definitely go over what the statutory framework is in terms of the possibilities sentence-wise.
Q. And in regards to the medication, you indicated that you -- he went under -- or he -- your understanding is he conducted -- or had conducted on him a competency examination?
A. Yes.
Q. And what was the results of that; do you recall?
A. He was found competent.
Q. And you indicated that you didn't have any -- when

you talked to him, he understood what you were talking about?

A. Yeah, I think we had a good relationship.

Q. Now, if the case would have gone to trial, would you have tried to use some of that issue of past mental health history or use of drugs to mitigate any of this?

A. Yeah. When you're at trial, you know, that's more of a sentencing argument, I think. I don't think that really goes, without a finding by a doctor, that he couldn't distinguish between right and wrong. I don't think I want to go in there and talk about his -- his drug consumption when you've got a finding by multiple doctors that he was competent.

And I realize that there's a difference between, you know, NGI and competency, but there was, to my recollection, never any claim about anything NGI. Furthermore, there was overwhelming admissions and evidence that it wasn't just prescribed medication he was taking. He was self-medicating with controlled substances as well.

Q. So you wanted to limit the jury's exposure to that if he had gone to trial, the use of the non -- nonprescription drugs?

A. Yeah. I don't see me being the person to introduce evidence of his consumption in front of the jury.

Q. And you would have vigorously kept it out if the State --
A. I imagine there would have been a motion in limine or something to that effect, in addition to severance, but these are all hypothetically saying if we didn't enter the plea agreement and we did go to trial, which are two very different things.
Q. And these are all strategy decisions that you make as an attorney.
A. Absolutely. It was a strategical decision, the direction we went. And like I said, a lot of it was bearing on the fact that he was eligible for the big habitual enhancement, which can carry up to life without parole.
Q. And Mr. Gonzales understood that, that he was looking at life without potential --
A. He appeared to. I mean, I can't -- I can't say exactly what's going on in his mind.
Q. But you remember talking to him about that?
A. Absolutely. That was the biggest concern here with -- with the record like he brought to the case and then the number of new felonies charged.
Q. And did -- do you recall getting the PSI in this case?
A. I don't specifically recall receiving it. I

definitely recall reviewing it.
Q. You reviewing it before. And you did that in this case, reviewed it beforehand?
A. I review the PSI before every sentencing.
Q. And if there's any factual incorrections, you would make them?
A. Correct, if I'm made aware of them. I'm not going to be aware of every potential factual discrepancy, especially if it's things such as, you know, the family or social history. The Defendant, you rely on them to tell you what may or may not be an error in some of those regards.

MR. GORDON: I have no further questions, Your Honor.

THE COURT: Ms. Butko.

MS. BUTKO: Just a couple.

REDIRECT EXAMINATION

BY MS. BUTKO:
Q. Do you recall, Mr. Cochran, telling Mr. Gonzales that his exposure on this case was 18 to 45 years?
A. Yeah, that would make sense, about 6 to 15. I don't recall specifically, but that would, I guess, seem logical.
Q. Do you recall telling him probation was available?
A. I don't recall off the top of my -- you know, it's

something that, you know, I look at at the time. But off the top of my head, I -- I think these were eligible for probation so that would make sense. If that was the case, then I would have advised him of such.

Q. And do you recall retaining the services of Earl Nielsen to do an evaluation upon Mr. Gonzales?

A. I don't recall if that was by me or Mr. Stermitz.

Q. And was the goal of retaining Earl Nielsen to mitigate sentence?

A. I'm sure it was regardless of who the counsel was.

Q. And so was one of the things you discussed with Mr. Gonzales, we'll get this evaluation from Mr. Nielsen, we'll work that into our sentencing argument and try for probation and treatment?

A. Certainly. At sentencing we try, you know, for probation as opposed to a prison sentence absent the client saying I want prison instead of probation. So, yes, I mean, if someone's probation eligible, the kind of default setting is go for probation, unless the client doesn't want that.

Q. Okay.

MS. BUTKO: That's all I have.

THE COURT: Mr. Gordon.

MR. GORDON: I don't have anything further, Your Honor.

THE COURT: Okay. Thank you, Mr. Cochran. You may step down.

MR. COCHRAN: Would you like me to leave the exhibits here, Your Honor?

THE COURT: Yeah, they're fine right there. And are you here pursuant to a subpoena?

MR. COCHRAN: I was not. I received a letter, and I think we both agreed that the Sheriff's Office has things far more important than to serve me. I'll voluntarily come here --

THE COURT: Okay, thank you.

MR. COCHRAN: -- when there's a claim.

MS. BUTKO: We never had a problem.

THE COURT: I think you're released then, thanks.

MS. BUTKO: Your Honor, my last witness is my client. Does the Court want to take a recess or go forward?

THE COURT: Yeah, just briefly. Okay, we'll take a brief recess and resume, thanks.

(Whereupon, court recessed)

THE COURT: And do you want your client to come forward?

MS. BUTKO: Yes, please, Your Honor.

THE COURT: Okay.

MS. BUTKO: I would call my client.

THE COURT: Mr. Gonzales, will you please come up. And we'll go back on the record. This is in Case CV 20,547, LeRoy -- Melvin LeRoy Gonzales, Petitioner, versus Renee Baker, Warden, Ely State Prison, Respondent. The record will reflect the presence of counsel and of the Petitioner.

And Mr. Gonzales, to the best of your ability, raise your right hand, and you will be placed under oath.

THE CLERK: You do solemnly swear the evidence you're about to give in the matter now pending before this Court shall be the truth, the whole truth, nothing but the truth, so help you God?

THE PETITIONER: Yes, ma'am.

THE COURT: Can you take the witness stand here. And watch your step there. You got it?

THE PETITIONER: Yeah, if I don't step on the chain. Thanks, officer.

THE COURT: Okay, thank you. And you may proceed.

MS. BUTKO: Thank you, Your Honor.

///

///

///

MELVIN LEROY GONZALES

(Sworn as a witness, testified as follows)

DIRECT EXAMINATION

BY MS. BUTKO:

Q. Could you please state your full name.

A. Melvin LeRoy Gonzales, Jr.

Q. And are you in custody?

A. Yes, ma'am.

Q. And where are you in custody?

A. At the Humboldt County Jail.

Q. Are you under the jurisdiction of the Nevada Department of Corrections?

A. Yes, I am.

Q. And are you in custody for the three stalking charges from this case?

A. Yes.

Q. Do you have any other sentences to serve?

A. No.

Q. Let's go back in time to January 17 of 2013. Did you rent a room at the Economy Inn?

A. Yes, I did.

Q. Do you recall what room number that was?

A. 114.

Q. Did you pay the rent for that room?

A. Yes.

Q. Did you have personal property inside that room?
A. Yes, I did.
Q. Did you give Officer Dave Walls consent to search that room?
A. No.
Q. Did you give Officer Elizabeth Hill consent to search that room?
A. No.
Q. Did you give Jared Rogers authority to enter your room?
A. No, I did not.
Q. At the time the police officers were at room 114, where were you?
A. I was at the casino.
Q. And were you arrested that day?
A. Yes, I was.
Q. And who arrested you?
A. Detective Walls.
Q. Now, who was your attorney on this case?
A. Matt Stermitz.
Q. And how long did you have Mr. Stermitz as your counsel?
A. Probably three months.
Q. Was he then replaced?
A. Yes, he was.

Q. Who replaced him?
A. Steve Cochran.
Q. Did you have a good relationship with Mr. Cochran?
A. Yeah, at the beginning.
Q. Did he discuss with you the possible defenses to the different charges in the case?
A. Yes, he did.
Q. Did he discuss the ability to file a motion to suppress?
A. No.
Q. Did he discuss the ability to sever the charges into two separate cases?
A. No, he just wanted it all in one.
Q. Okay. Was -- what was his approach on the case?
A. I actually don't remember.
Q. Okay. Did you remain in custody at the Humboldt County Jail the entire time?
A. Yes, I did.
Q. Were you able to make bail?
A. No.
Q. Did you suffer from mental health issues at that point?
A. Yes.
Q. What kind of issues did you have?
A. Depression, bipolar disorder.

Q. Were you taking medications?
A. Yes, I was.
Q. What medications were you taking?
A. I was taking Seroquel, which is a mood stabilizer, and Trazodone.
Q. Let's talk about the Seroquel. What kind of an effect did it have on you?
A. Oh, it messed me up bad.
Q. In what way?
A. High.
Q. Could you understand what was happening?
A. No.
Q. And were you taking that at the time your case was actually in court?
A. Yes.
Q. Did you tell Mr. Cochran how the Seroquel was affecting you?
A. Yes, I did.
Q. What did he say?
A. Nothing really.
Q. You also said you were taking Trazodone, correct?
A. Yes, ma'am.
Q. How did the Trazodone affect you?
A. The same way.
Q. And were you taking both of those drugs at the same

time?
A. Yes, I'd take both of them early in the morning and at nighttime.
Q. Did you talk to Mr. Cochran about the worst case scenario on your case, how much time you could get?
A. He told me that if I don't sign the deal, that I would get the habitual.
Q. Did he tell you which habitual criminal statute would apply?
A. No.
Q. Did you feel threatened?
A. Yeah, because I wasn't -- because to being habitual, I was being told I was going to get if I didn't take that deal.
Q. And so he was telling you you were going to get life without the possibility of parole --
A. Yes.
Q. -- if you didn't bargain your case?
A. Yes, ma'am.
Q. Did Mr. Cochran talk to you about the difference between the statutes, the 200.575(3), aggravated stalking, versus the category C stalking, where you use electronic equipment?
A. At first he did, and then after that, it was all aggravated stalking with the 2 to 15.

Q. Did he suggest that he could file any motions to get the correct charges against you?
A. No, he didn't.
Q. Now, ultimately, did you enter a plea of guilty to three counts of aggravated stalking?
A. Yes, I did.
Q. What did you understand your plea bargain to be?
A. Two 2 to 15's running concurrent and one consecutive.
Q. And that's what you believed from the presentence report?
A. Yes.
Q. At the time you entered your plea, did you expect the State to recommend concurrent sentences?
A. Yes, I did. That's what I was told.
Q. And did that happen?
A. No.
Q. Would you have entered a guilty plea if you didn't think the State was going to honor their deal?
A. No, I wouldn't have.
Q. Did Mr. Cochran make you any promises concerning the plea?
A. Just that if I -- if I signed that deal, that's what I would get.
Q. And you believed it would run concurrent sentences?

A. Yes, I did.
Q. Did Mr. Cochran discuss with you probation?
A. He said it was probational, yes.
Q. Did he discuss with you treatment?
A. Yes.
Q. At the time you entered your guilty plea, did you expect some sort of treatment to be ordered?
A. I was expecting it, yes, but from the way he was talking after everything, I knew that I was screwed.
Q. Did you ask Mr. Cochran to withdraw your guilty plea?
A. Yes, I did.
Q. Did he do it?
A. Nope.
Q. What did he tell you?
A. He told me the deal is the deal.
Q. Did you ask Mr. Cochran to appeal your case?
A. Yes.
Q. And did he appeal your case?
A. Yeah.
Q. Were you in prison at that time?
A. Yes, I was.
Q. Did Mr. Cochran ever visit you at prison?
A. No, never.
Q. Did you have any discussions over what issues would

be raised on appeal?
A. No. The only time -- the only person I would talk to is his secretary when I would call.
Q. Now, concerning the actual appeal, did he provide you copies of the documents?
A. Yes.
Q. And did he provide you copies of the State's replies?
A. I think he did, yes.
Q. Okay. Did Mr. Cochran tell you that your plea exposed you to 18 to 45 years in prison?
A. Yes.
Q. And you still pled guilty?
A. Like I said, it was either that or the being habitual. That's what I was being threatened with.
Q. How old are you?
A. Forty-eight.
Q. And how old were you when you were actually sentenced on this case?
A. Almost 43.
Q. Okay. The actual stalking conduct that you did, did you -- did you leave voicemail messages?
A. Yes, I did.
Q. Did you send text messages?
A. Yes.

Q. Did you ever personally go near Ossa Palette?
A. No.
Q. Did you ever personally go near Richard Palette?
A. No, I didn't.
Q. Did you ever personally go near Connie Ramirez?
A. I tried to talk to her but...
Q. When you say you "tried to talk to her"?
A. I tried to set up a meeting to go to a Jack in a Box, but then I was going over there and then I saw all the cops and I was like no. So I knew something was up.
Q. So you knew you really didn't need to meet her?
A. Right.
Q. And your prior record is not a record of violence, correct?
A. Correct.
Q. So this was really your first crime of violence?
A. Correct.
Q. Had you paid your rent for room 114?
A. Yes, I did.
Q. In fact, did you lose money on it?
A. Yes, I did, as a matter of fact.

MS. BUTKO: Just a moment, Your Honor. That might be it.

THE COURT: That's okay, take your time.

BY MS. BUTKO:

Q. If the Judge allows you to withdraw from this guilty plea, is it your intention to take your case to trial?
A. Yes.
Q. Did Mr. Cochran do anything to discuss how the habitual offender statutes apply versus just telling you you're going to get life without?
A. No, he didn't.
Q. You had an evaluation by Earl Nielsen, correct?
A. Yes.
Q. Who ordered that evaluation?
A. I think it was Steve Cochran ordered it.

MS. BUTKO: Okay. That's all I have, Your Honor.

THE COURT: Mr. Gordon, cross-examination.

MR. GORDON: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. GORDON:

Q. Mr. Gonzales, you testified that this crime that you're currently incarcerated on was your first crime of violence?
A. Yes.
Q. But you were, in fact, convicted twice of domestic violence, weren't you, in Henderson, Nevada, in 1995?
A. I was but nobody got hurt. It was -- we were just arguing, and I went to jail.

Q. And isn't that the same thing here, that you were arguing? Because you were convicted of the threats through the phone, right?
A. Yes.
Q. So, essentially, it's the same conduct, isn't it?
A. No matter -- depends on how you look at it.
Q. Now, did you ever talk to your -- you were trying to meet your ex-wife at Jack in the Box?
A. Yes.
Q. And that never happened?
A. No.
Q. Did she agree to meet you there?
A. Yes.
Q. And the -- you signed a plea agreement in this case, right?
A. Yes, I did.
Q. And in that -- did you read the plea agreement, or did you have it explained to you?
A. Yeah, but I was all messed up on my psych meds at the time.
Q. Okay. So did you -- did you tell the Court that you were messed up on the psych meds?
A. No, I didn't.
Q. And when you were sentenced, there was a delay between the sentencing and the -- the plea agreement and

the sentencing, right?
A. I don't know what you mean.
Q. Well, I mean, it didn't happen in the same day, right? You pled guilty one day and then you were sentenced the next day?
A. No, I pled guilty at that same day and got sentenced.
Q. That same -- not the same day?
A. Yes. Yes. I signed -- I signed the plea agreement, and I got sentenced.
Q. Well, the plea agreement was signed on January 17th, right?
A. I don't remember when, what day it was.
Q. But there was like a two-month time? Do you remember being interviewed by the Probation Department?
A. Yes.
Q. Now, did you tell the Probation Department that you were having problems with your medication?
A. Yes, I did.
Q. And then did you tell the Court that when you were sentenced that you had problems with your medication --
A. No, I didn't.
Q. -- and you couldn't understand?
And why was that?
A. I don't know. I just didn't.

Q. Do you remember the Court asking you if you were on any type of drugs or anything?
A. Yes.
Q. And what was your answer?
A. I told him no.
Q. And you did that on both times, at the time of the plea and the time of the -- now, when you -- on the appeal, did you discuss the issues that you wanted to raise with Mr. Cochran?
A. I couldn't. I was in prison.
Q. But did you talk to him on the phone?
A. I talked to him maybe once but all the other times was his secretary.
Q. And then when you talked to him once, did you -- did he go over the issues?
A. No, he didn't.
Q. Did you tell him that one of the issues that you may have wanted to appeal was the issue that you were on medication?
A. Yes, I told him that.
Q. Do you remember what he said?
A. No, I don't.
Q. And the plea agreement on January 7th, you signed it, right?
A. Yes.

Q. Now, did you read it, or did you have it explained to you?
A. I read it.
Q. Okay. Now, on the first page where it says both sides are -- do you remember where it says both sides are free to argue at sentencing?
A. Yes.
Q. So you were aware of seeing that beforehand?
A. Yeah.
Q. Now, did Mr. -- do you remember the Court telling you that even though you sign a plea agreement, the Court is free to sentence you to -- to anything that the statute requires --
A. Yes.
Q. -- or allows?
A. Yes.
Q. So you understood that when you signed the plea agreement?
A. I understood that the Judge told me he could do whatever he wants to do.
Q. And you remember him saying that?
A. Yes. Yes.
Q. And then you also remember the State -- the plea agreement says both sides are free to argue so when Mr. Pasquale said he recommend -- or he concurs with

probation, you didn't -- you didn't think -- did you think there was something wrong with that, or did you think that was normal?

A. There was something wrong with it because I knew I wasn't going to get probation. I was basically told I'm going to prison.

Q. And when -- who told you that?

A. My -- Steve Cochran.

Q. Cochran. So when Mr. Pasquale said I concur with probation, you thought that meant probation?

A. No.

Q. Or what --

A. No. I didn't think it was probation. I knew I was going to prison. I knew -- what I thought he was talking about was with the plea agreement.

Q. Plea agreement. But you remember the plea agreement said both sides are free to argue?

A. Yes.

Q. Now, do you recall the -- you had Mr. Stermitz beforehand, right?

A. Yes, I did.

Q. Do you remember why he was not -- why there was a change of attorneys?

A. Because I asked for one.

Q. And why was that?

A. Because he wasn't doing his job.
Q. But you -- did you feel Mr. Cochran was doing his job then?
A. At the beginning, yes. But at the end, no.
Q. And what do you mean at the end, after you were sentenced or --
A. Yes. Well, right -- when I was getting sentenced.
Q. So you were fine with Mr. Cochran up until you got sentenced, and then after you got sentenced --
A. And when he -- until he promised me and then after that, I knew he -- it was --
Q. What did he promise you though?
A. That I was going to get 2 to 15, ran concur with one and the other one consecutive.
Q. Yeah, but didn't you understood -- but you understood at the time you amend the plea that the Judge told you he can do what he wants?
A. But he didn't tell me that -- he told me at sentencing, right before he sentenced me. You know I can do what I want. This is my court.
Q. And the judge told you that?
A. Yes.
Q. And so you knew -- and you're saying at that point, when the judge told you that, your relationship with Mr. Cochran changed?

A. I knew once I was sentenced and I didn't hear from him or nothing for a long time, until I asked him to send me all my paperwork, and I didn't hear nothing good on my appeals.
Q. But it's only after you were sentenced that your relationship with Mr. Cochran turned negative?
A. Yes.
Q. But at -- prior to the sentencing, you were all fine with Mr. Cochran?
A. Yeah.
Q. And he was a lot -- in your opinion, not my opinion, but your opinion, he was a lot better than Mr. Stermitz?
A. Anybody is better than Stermitz.
Q. So when you got Mr. Cochran, you -- you were pleased?
A. For the time being, yes.
Q. And during the time up to your plea agreement, did you have various conversations with Mr. Cochran?
A. Every once in a while.
Q. But they were both --
A. He came -- he came to see me once, and then I talked to him on the phone a couple of times.
Q. But you understood he was in Lovelock, right?
A. Yeah, but he had cases here.
Q. In Winnemucca. But he was full-time in Lovelock.

A. Yeah, I understand that.
Q. And prior to the -- the plea, did you talk about different strategies with Mr. Cochran?
A. No.
Q. Did you -- did you talk about if you were going to trial, what you would have done?
A. No. All he said was best thing for you to do is sign this plea so you don't get the habitual.
Q. And you were -- never got the habitual; is that correct?
A. I don't know. I signed the plea.
Q. But no one charged you with habitual criminal?
A. Not -- not -- because I signed the plea.
Q. Okay. So that was --
A. I signed the plea.
Q. -- you actually gain -- that was the benefit of the plea?
A. Yes, I signed the plea.
Q. So you got that benefit?
A. Well, it was a threat, but, yes, I got that benefit.
Q. But you freely and -- you freely signed this, right?
A. Yes.
Q. No one took your hand and made you sign it?
A. Nope.
Q. And then lastly when you're -- you had the

evaluation with Dr. Nielsen, did you recall that he found you competent?

A. I don't recall that. I'm pretty sure, yeah.

Q. Okay.

A. If you guys got the evaluation, if you guys read it, you understand it.

Q. Yeah. But did -- did Mr. Cochran explain the evaluation to you?

A. The doctor did.

Q. The doctor did?

A. Yeah.

Q. Did the doctor tell you he was going to find you competent?

A. Yep.

MR. GORDON: I have no further questions, Your Honor.

THE COURT: Ms. Butko.

MS. BUTKO: No, thank you, Your Honor.

THE COURT: Thank you. You may step down. Watch your step there. If you want to slide that chair around, you can. It might make it easier.

THE PETITIONER: Thanks.

MS. BUTKO: Your Honor, that would be the Petitioner's presentation of evidence short of filing the supplemental paperwork.

THE COURT: Okay, thank you. Does the State have any evidence?

MR. GORDON: No, Your Honor.

THE COURT: Okay. With that -- well, let me get Mr. Gonzales back to his seat. Counsel, since the Court today has already ruled on the issue of supplementing the petition to include this additional ground number 7, I'd like for that supplement to also include -- because you're going to be arguing about that, I'd like that to also include your closing argument, okay?

MS. BUTKO: That makes sense, Your Honor.

THE COURT: And might as well make it as to all of this because that will truly -- when it will be at closed, okay? So Mr. Gordon, you have an opportunity to respond and make your closing recommendations at that time.

MS. BUTKO: Thank you, Your Honor.

THE COURT: Okay?

MR. GORDON: Okay, Your Honor.

MS. BUTKO: I should be able to get that out within ten days, I think.

THE COURT: Okay, good. Then let's put some time frames on this because I don't want -- I mean, I'm not putting time frames on myself, don't get me wrong.

MS. BUTKO: I don't want to hit the holiday season.

THE COURT: But I want to -- I'd like to, if we're going to have a briefing schedule, let's have a briefing schedule.

MS. BUTKO: Perfect.

THE COURT: And I think we need to be realistic about this. So Ms. Butko, if you're going to file this supplement, today being October 4th, what -- what do you think is realistic here, and if there's an objection I'll entertain it.

MS. BUTKO: Can we go to the end of the next week so that I have a full week?

THE COURT: The 12th? That would be -- today's the 4th. The next Friday is the 12th.

MS. BUTKO: Let's go a little further.

THE COURT: Okay. Let's go to -- how about the 19th is the next Friday, and the 26th is the fourth Friday.

MS. BUTKO: By the 19th is fine.

THE COURT: The 19th?

MS. BUTKO: Yep.

THE COURT: Okay. I don't want to -- I don't want to cut you short here. So how about if we say then that the Petitioner's supplemental briefing will be --

will be filed -- well, will be signed and at least mailed to the Court for filing on the 19th --

MS. BUTKO: Got it.

THE COURT: -- of October.

Okay, Mr. Gordon, now I'm going to give you an opportunity. Your reply. Do you want to look at a calendar? If you both want to approach to look at the calendar together, I don't mind.

MR. GORDON: Yeah.

MS. BUTKO: I've got -- I've got my calendar here. Do you want to look?

THE COURT: Okay, there you go, look at yours. Look at October and November.

MS. BUTKO: I'm old-fashioned.

THE COURT: Okay, thank you.

MS. BUTKO: So we'll go -- if I'm going in there, two weeks puts you into November 2nd-ish, two weeks, and that's the holiday.

MR. GORDON: When's the holiday?

MS. BUTKO: Veteran's day. Is Veteran's day a holiday, the 9th?

THE COURT: Yes, I believe -- let's see, you're going to go to the -- let me make sure I'm on the right -- you're going to go to the 19th, and you're looking at now November.

MS. BUTKO: Yes.

THE COURT: OKAY. Yes, I think it's the 12th. Let's take a look here.

MR. GORDON: I'm trying to do my (indiscernible) schedule the holidays because there's -- for me it's more of an issue of secretarial staff.

MS. BUTKO: And I don't have a secretary so don't blame that. I don't want to hear that. So if I'm in by the 19th of October --

THE COURT: Do you want to have yours by the 16th of November? That gives you almost a full month.

MR. GORDON: Yeah, that will be fine. I think I can --

THE COURT: Okay, November 16th. Ms. Butko, are you --

MS. BUTKO: That's fine.

THE COURT: -- willing to accept that?

MS. BUTKO: That's fine.

THE COURT: So let's let the record reflect today that we have a scheduling order, and if they're not filed timely, then I may not consider them, okay? So the 19th of October for the Petitioner's supplemental, and the 16th of November for the State's response, okay?

MR. GORDON: Yeah, and just for the record, I

think this is the second supplemental.

THE COURT: It may be. It -- but I -- but I'm going to recognize it's a supplement to whatever you've done thus far.

MS. BUTKO: To add the --

MR. GORDON: I was just -- because my -- I noticed on the second supplemental I filed at -- the second supplemental wasn't put in there.

THE COURT: Okay.

MR. GORDON: So I don't want to file another amendment with just the front page.

THE COURT: Yeah, you figure out what it should be called.

MR. GORDON: Okay.

THE COURT: I'm just saying that it's a supplement to what we have thus far.

MR. GORDON: Yeah.

MS. BUTKO: Perfect.

THE COURT: You guys can figure out which exact title or -- it needs, okay? But we do have a scheduling order now.

MS. BUTKO: Thank you, Your Honor.

THE COURT: Thank you all very much. We'll be in recess for today. Before we go off the record, Mr. Gonzales, do you understand what we have done

here --

THE PETITIONER: Yes.

THE COURT: -- with the additional briefing?

THE PETITIONER: Yes.

THE COURT: Okay, very good.

MS. BUTKO: And just to make it clear, my client does not need to stay at Humboldt County for any reason. He's free to go back to prison.

THE COURT: Okay. And where is -- is that Ely?

THE PETITIONER: No, Lovelock.

THE COURT: Oh, Lovelock, okay.

THE PETITIONER: Well, I was at Ely before. That's --

THE COURT: Okay.

THE PETITIONER: -- when I filed the paperwork.

THE COURT: So you're -- you're a little closer now.

THE PETITIONER: Yeah.

THE COURT: Okay. Okay, thank you very much.

MS. BUTKO: Thank you, Your Honor.

THE COURT: We'll be in recess for today.

(Whereupon, the proceedings concluded)

STATE OF NEVADA)
) ss.
COUNTY OF CARSON)

I, Julie Rowan, Transcriptionist for the Sixth Judicial District Court of the State of Nevada, in and for the County of Humboldt, have transcribed the proceedings held in Department II of the above-entitled Court on October 4, 2018.

The foregoing is a true and correct transcript, to the best of my ability, from the electronic sound recording of the proceedings held in the above-entitled matter.

DATED: This 15th day of November, 2018.

Julie Rowan

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

Case No. CV 20,547

Dept. No. II

IN THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF HUMBOLDT.

-oOo-

MELVIN LEROY GONZALES,

Petitioner,

RENEE BAKER, WARDEN, ELY STATE PRISON

Respondent.

_____/

AMENDED STATE'S EVIDENTIARY HEARING BRIEF AND RESPONSE TO PETITIONER'S SUPPLEMENTAL PETITION FOR WRIT OF HABEAS CORPUS (POST CONVICTION)

COMES NOW, the State of Nevada, by and through Anthony R. Gordon, Humboldt County Deputy District Attorney, and hereby files this Amended State's Evidentiary Brief and Response to Petitioner's Supplemental Petition for Writ of Habeas Corpus (Post-Conviction). This Response is based upon the attached Points and Authorities and all the pleadings and papers on file herein.

Pursuant to NRS 239B.030, the undersigned hereby affirms this document does not contain the social security number of any person.

DATED this 4th day of October, 2018.

ANTHONY R. GORDON
Deputy District Attorney

246

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

POINTS AND AUTHORITIES

FACTS

On January 17, 2013, the Petitioner was arrested by the Humboldt County Sheriff's Office for aggravated stalking charges against his ex-wife, Connie Ramirez and her parents, who lived in Humboldt County, Nevada. Subsequently, on January 7, 2014, pursuant to a guilty plea agreement Petitioner entered pleas of guilty to three (3) counts of Aggravated Stalking, a Category B. Felony, in violation of NRS 200.575(2), and was thereafter sentenced on April 15, 2014, to three (3) consecutive terms of a minimum of sixty-two (62) months to one hundred fifty-six (156) months in the Nevada Department of Corrections.[1] The Nevada Supreme Court issued an Order of Affirmance in this case on November 12, 2014. Thereafter, the Petitioner filed a Writ of Habeas Corpus (Post-Conviction) on November 16, 2015, with the Respondent filing a response brief on May 12, 2016. The Petitioner subsequently filed a Supplemental Petition for Writ of Habeas Corpus (Post-Conviction) on May 15, 2017. Upon review of the relevant papers and pleadings herein, the Court ordered an evidentiary hearing in this matter on April 13, 2018. This Response is meant to supplement the State's previously filed response and legal arguments at the upcoming evidentiary hearing in this matter, and to clarify the issues in this case for the Court.

LEGAL ARGUMENT

This matter has now been set for an evidentiary hearing pursuant to *NRS 34.770*. Under *NRS 34.830(1)* this Court is required to dispose of a Writ of Habeas Corpus (Post Conviction), by an order containing specific findings of fact and conclusions of law supporting its decision, after which the Petitioner has been given the opportunity to invoke any method of discovery available to him under the Nevada Rules of Civil Procedure. (*See NRS 34.780*). Furthermore, under *Bolden v.*

[1] The factual basis herein comes from the Presentence Investigation Report dated February 4, 2014, and submitted to this Court by the Nevada Department of Public Safety. Parole and Probation Division.

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

State, 97 Nev 71, 73, 624 P.2d 20,21 (1981), a verdict will not be disturbed on appeal, where there is substantial evidence supporting a conviction.

As grounds for the Petitioner's Petition for Writ of Habeas Corpus (Post-Conviction), he pleads six (6) grounds of ineffective assistance of counsel under the 4th, 6th and 14th Amendments to the U.S. Constitution. All of the Petitioner's allegations are groundless and are not supported factually by the record or legally under relevant statutory and Federal and Nevada Constitutional law. As a result, the Petitioner's Original and Supplemental Writ of Habeas Corpus (Post-Conviction) must be denied in their entirety. For ease of reference, each substantive allegation will be dealt with individually as noted below.

I.

INEFFECTIVE ASSISTANCE OF COUNSEL (GROUNDS I-VI)

As noted above, the Petitioner alleges six (6) individual grounds of ineffective assistance of counsel in violation of his 6th and 14th Amendments to the U.S. Constitution. (*See Petitioner's Supplemental Petition for Writ of Habeas Corpus (Post-Conviction)*, pages 5-6). While the 6th Amendment to the United States Constitution guarantees effective assistance of counsel at trial, in order to establish a claim of ineffective assistance of counsel, the Petitioner must first show that counsel's performance fell beneath "an objective standard of reasonableness" *Strickland v. Washington*, 466 U.S. 668, 688 (1984). Only when the Petitioner has shown that counsel's performance fell beneath "an objective standard of reasonableness" and a deficiency therefore exists, the Petitioner must then show, but for his counsel's deficiency, a different result would have been had at trial. *Id* at 694; *Rubio v. State*, 124 Nev 1032, 1040, 194 P.3d 1224, 1229 (2008).

In *Oliver v. State*, 281 P.3d 1206 (Nev., 2009), the Nevada Supreme Court held that in order to state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a petitioner must demonstrate that his counsel's performance

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that there is a reasonable probability that, but for counsel's errors, petitioner would not have pleaded guilty and would have insisted on going to trial. *Hill v. Lockhart,* 474 U.S. 52, 57, 58–59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); *Kirksey v. State,* 112 Nev. 980, 978–88, 923 P.2d 1102, 1107 (1996). According to *Oliver, supra* at 1206, the court need not address both components of the inquiry if the petitioner makes an insufficient showing on either one. *Strickland v. Washington,* 466 U.S. 668, 697, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

In order to establish an objective standard of reasonableness, the court must look to the "prevailing professional norms" of legal practice, *Wiggins v. Smith,* 539 U.S. 510, 521 (2003) (quoting *Strickland*, 466 U.S. at 688). Additionally, effectiveness does not mean errorless and courts have noted that effectiveness means performance "within the range of competence demanded of attorneys in criminal cases." *Jackson v. Warden, Nev. State Prison*, 91 Nev. 430, 43[2], 537 P,2d 473, 474 (1975) (quoting *McMann v. Richardson,* 397 U.S. 759, 771 (1970)). Courts have noted that effectiveness encompasses making "sufficient inquiry into the information that is pertinent" to the case in order to make "a reasonable strategy decision on how to proceed with a client's case." *See Doleman v, State*, 112 Nev. 843, 848, 921 P.2d 278, 280 (1996) (*citing Strickland*, 466 U.S. at 690-91). Furthermore, courts have held that strategic decisions made by trial counsel are assumed to be intentional and are "virtually unchallengeable." *Doleman,* 112 Nev. at 848, 921 P,2d at 280 (*quoting Howard v. State*, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990), strategic decisions based on an incomplete investigation are reasonable "precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland, supra* 466 U.S. at 690-91).

Secondarily, even if a petitioner can establish deficient performance of his trial counsel, he must then establish "prejudice" by a showing that counsel's errors were so serious as to

HUMBOLDT COUNTY DISTRICT ATTORNEY
P.O. Box 909
Winnemucca, Nevada 89446

deprive the defendant of a fair trial, a trial whose result is reliable. (*Id.* at 687.) Proving prejudice requires the defendant to "show that there is a reasonable probability that, "but" for counsel's unprofessional errors, the result of the proceeding would have been different. In these situations, reasonable probability is defined as "a probability sufficient to undermine the confidence of the outcome" with a court hearing claims of ineffective assistance of counsel considering the totality of the evidence in determining prejudice. *Id.*

In *Morales v. State* (Nev., 2014) the court held that to prove ineffective assistance of appellate counsel a petitioner "must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness, and resulting prejudice such that the omitted issue would have a reasonable probability of success on appeal," *citing Kirksey v. State,* 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996), *Morales, supra* at page 8. The *Morales* court further noted that "Appellate counsel is not required to raise every non-frivolous issue on appeal," *citing Jones v. Barnes,* 463 U.S. 745, 751 (1983), and that "[r]ather, appellate counsel will be most effective when every conceivable issue is not raised on appeal," *citing Ford v. State,* 105 Nev. 850, 853, 784 P.2d 951, 953 (1989), *Morales, supra* at page 8. Thirdly, the *Morales* court also noted that "[b]oth components of the inquiry must be shown," citing *Strickland v. Washington,* 466 U.S. 668, 697 (1984), and that they will "give deference to the court's factual findings if supported by substantial evidence and not clearly erroneous but review the court's application of the law to those facts de novo," *citing Lader v. Warden,* 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005), *Morales, supra* at page 9.

Finally, as to claims of ineffective assistance of trial counsel at the sentencing proceeding. according to the Nevada Supreme Court in *Oliver,* to state a claim of ineffective assistance of counsel sufficient to warrant a new sentencing hearing, a petitioner must demonstrate that his counsel's performance was deficient in that it fell below an objective standard of reasonableness,

CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of Karla K. Butko, Ltd., P. O. Box 1249, Verdi, NV 89439, and that on this date I caused the foregoing document to be delivered to all parties to this action by

X placing a true copy thereof in a sealed, stamped envelope with the United States Postal Service at Reno, Nevada.

_____ personal delivery

_____ Federal Express or other overnight delivery

_____ Reno/Carson Messenger Service

addressed as follows:

Michael MacDonald
District Attorney of Humboldt County
P. O. Box 909
Winnemucca, NV 89446
ATTN: Anthony Gordon, Esq.

DATED this 10th day of June, 2019.

KARLA K. BUTKO, ESQ.